Supreme Court, U.S.
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No. 99-1641

IN THE

Supreme Court of the United States

U S WEST COMMUNICATIONS, INC.,
Petitioner,

v.

MFS INTELENET, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Could the Ninth Circuit, in the context of reviewing a state regulator's implementation of FCC rules under the Telecommunications Act of 1996, usurp the Eighth Circuit's exclusive jurisdiction under the Hobbs Act to determine the validity of those rules?

2. Did this Court's reinstatement of an FCC rule that prevents incumbent telephone carriers from gratuitously disassembling their networks before giving competitors access to them *also* reinstate a different, unappealed set of rules requiring incumbents to custom-build networks for their competitors' benefit?

PARTIES TO THE PROCEEDING

Gillis, William P., in his official capacity as Commissioner of the Washington Utilities and Transportation Commission

Hemstad, Richard, in his official capacity as Commissioner of the Washington Utilities and Transportation Commission

Levinson, Anne, in her official capacity as Chairperson of the Washington Utilities and Transportation Commission

MFS Intelenet, Inc.

U S WEST Communications, Inc.

Washington Utilities and Transportation Commission

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioner advises the Court as follows:

Petitioner U S WEST Communications, Inc., a local exchange carrier that provides telecommunications products and services to the general public, is a wholly owned subsidiary of U S WEST, Inc., a publicly held corporation that provides services to the public only through its operating subsidiaries. There is no publicly held company that owns 10% or more of the stock of U S WEST, Inc.

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PETITION FOR A WRIT OF CERTIORARI

U S WEST Communications, Inc. ("U S WEST") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The decision of the court of appeals (App. 1a) is reported at 193 F.3d 1112 (9th Cir. 1999).

JURISDICTION

The decision of the court of appeals was issued on October 8, 1999. The court of appeals denied U S WEST's petition for rehearing and petition for rehearing en banc on January 12, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The statutory provisions at issue here, 47 U.S.C. §§ 251, 252, and 28 U.S.C. §§ 2342 *et seq.*, are reproduced at App. 87a-111a.

STATEMENT OF THE CASE

This case presents a question of competing priority between two United States Courts of Appeals: the circuit court reviewing the validity of a Federal Communications Commission rule on direct appeal under the Hobbs Act (here, the Eighth Circuit), and the circuit reviewing a state regulator's implementation of the same FCC rule under the Telecommunications Act of 1996 (here, the Ninth Circuit, in the decision under review). In the case below, the Ninth Circuit upheld a state order directing the Petitioner, an incumbent local telephone company, to reconfigure the components of its network in whatever way its competitors demand. The court upheld this order even though (1) the state regulator was simply adhering to an FCC rule that imposed the identical requirement; (2) the Eighth Circuit Court of Appeals had *vacated* that rule on direct Hobbs Act review as contrary to the Telecommunications Act; (3) the Eighth Circuit was in the midst of considering whether to modify its vacation in light of a decision on review by this Court; and (4) the state regulator will be bound by the outcome of the Eighth Circuit proceedings. Rather than defer to the Eighth Circuit's exclusive jurisdiction under the Hobbs Act to reconsider whether the federal rule violated the Telecommunications Act, the Ninth Circuit preempted that jurisdiction and announced that its sister circuit must have erred when it originally vacated the rule.

The Ninth Circuit's decision boils down to a determination that state regulators—and the federal courts reviewing their actions—are free to ignore the circuit court vested with exclusive jurisdiction to review the federal rules that state regulators must follow. Only this Court is in a

position to resolve the circuits' conflicting claims of priority and vindicate the jurisdiction of the Eighth Circuit. Certiorari is warranted to achieve uniformity of federal law under the Telecommunications Act and the orderly litigation of cases among the circuits, as well as to resolve a split between the Ninth and Fourth Circuits regarding the proper jurisdiction of a federal district court reviewing a state regulator's implementation of the Telecommunications Act.

A. The Telecommunications Act of 1996

As this Court recognized last year, the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified in pertinent part at 47 U.S.C. §§ 251 *et seq.*), "fundamentally restructures local telephone markets," shifting significant authority over those markets from state regulators to the Federal Communications Commission ("FCC"). *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999). Section 251 of the Act imposes a series of network- and market-opening obligations on incumbent local exchange carriers ("LECs") to enable new competitors to enter the market, *see* 47 U.S.C. § 251, and Congress specifically charged the FCC with adopting rules to implement those obligations. *See id.* § 251(d)(1). Like most FCC edicts, the FCC rules implementing the Telecommunications Act are directly (and exclusively) reviewable in the federal circuit Courts of Appeals pursuant to the Hobbs Act. *See* 47 U.S.C. § 402(a); 28 U.S.C. §§ 2341 *et seq.*

The Telecommunications Act also enlists state public utility commissions to aid in the implementation of the FCC's rules. It requires incumbent local exchange carriers and new entrants to negotiate the terms of their relationships, and if voluntary negotiations fail, authorizes either side to request arbitration by the public utility commission of the state in which the carriers provide service. *See* 47 U.S.C. § 252(a), (b). In those circumstances, the state commission is authorized to "impos[e] appropriate conditions as required to implement [§ 252(c)]," which in turn requires the

commission to "ensure that such resolution and conditions meet the requirements of section 251, including the regulations prescribed by the [Federal Communications] Commission" pursuant to that section. *Id.* § 252(b)(4)(C), (c)(1). Put simply, any conditions (other than pricing and implementation schedules, *see id.* § 252(c)(2), (3)) imposed under the authority of federal law must be limited to those required to achieve compliance with section 251 and implementing FCC rules. *See also id.* § 252(e)(2)(B).

As this Court has observed, "a federal program administered by 50 independent state agencies is surpassing strange." *Iowa Utils. Bd.*, 525 U.S. at 378 n.6. In order to maintain federal control of federal telecommunications law and policy, Congress subjected state commissions' decisions to judicial review in federal district courts "to determine whether [they] meet[] the requirements of section[s] 251 and [252]." 47 U.S.C. § 252(e)(6). This Court has noted that such review is vital to ensuring the primacy of federal regulation under the Act: "[T]here is no doubt . . . that if the federal courts believe a state commission is not regulating in accordance with federal policy they may bring it to heel." *Iowa Utils. Bd.*, 525 U.S. at 378 n.6. For purposes of this case, the most important aspect of section 252(e)(6) district court review is that the reviewing court must determine whether the state regulator's arbitral decision "meet[s] the requirements of" section 252, including that section's requirement that state regulators follow FCC rules in arbitrating disputes. *See* 47 U.S.C. § 252(c)(1).

B. The FCC's Network Element Reconfiguration Rules and the Proceedings in the Eighth Circuit and This Court

Section 251(c)(3) of the Act obligates incumbent LECs "to provide, to any requesting telecommunications carrier . . . , nondiscriminatory access to network elements on an unbundled basis at any technically feasible point." 47 U.S.C. § 251(c)(3). The incumbent must further "provide such

unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide . . . telecommunications service." *Id.* The FCC adopted a series of rules implementing this provision. *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 (1996) (codified in pertinent part at 47 C.F.R. §§ 51.301 *et seq.*). One FCC rule (at issue in *Iowa Utilities Board*, but not this case) prohibited incumbents from separating requested network elements that they already combine for themselves, except on request by the competing carrier, 47 C.F.R. § 51.315(b) (App. 110a) (hereinafter, the "no-separation" rule). Two other FCC rules (the "reconfiguration" rules) affirmatively required an incumbent, on the competing carrier's request, to perform the acts necessary "to combine unbundled network elements in any manner, even if those elements are not ordinarily combined in the incumbent [carrier's] network," *id.* § 51.315(c) (App. 110a), and to perform any acts necessary to combine unbundled network elements "with elements possessed by the requesting telecommunications carrier," *id.* § 51.315(d) (App. 110a). The only limitations on these affirmative obligations to reconfigure the incumbent's own network to meet competitors' demands were that the requested combination be "technically feasible" and that it not impair other carriers' access to unbundled elements or to interconnection. *Id.* § 51.315(c)(1)-(2), (d) (App. 110a).

Petitioner U S WEST, other incumbent carriers, and state public utility commissions petitioned for review of the FCC rules under the procedures laid out in the Hobbs Act. Pursuant to those procedures, the petitions were consolidated into a single court—the United States Court of Appeals for the Eighth Circuit. The Eighth Circuit vacated both the no-separation rule (47 C.F.R. § 51.315(b)) and the reconfiguration rules (47 C.F.R. § 51.315(c)-(f)) as contrary to section 251(c)(3) of the Telecommunications Act; according to the court, that section merely requires

incumbents to provide unbundled network elements in a manner that enables competitors to combine those elements *for themselves*. *See Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 813 (9th Cir. 1997), *aff'd in part and rev'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

The FCC and others asked this Court to review several aspects of the Eighth Circuit's decision, including its vacation of the no-separation rule. The parties did not seek review of the vacation of the reconfiguration rules, and this Court never addressed those rules. This Court reversed some of the Eighth Circuit's rulings, including its vacation of the no-separation rule. The Court explained that the FCC interpretation embodied in that rule was reasonable because the statute "does not say, or even remotely imply, that elements must be provided only [in discrete pieces] and never in combined form." *Iowa Utils. Bd.*, 525 U.S. at 394. The Court declined to equate "unbundled" with "physically separated," finding the term ambiguous and therefore within the FCC's discretion to construe it. *Id.* at 394-95. In particular, the Court accepted the FCC's grounding of the rule in the nondiscrimination requirement of section 251(c)(3); the FCC contended that the rule was intended to prevent incumbent carriers from arbitrarily disconnecting elements that were already combined, "not for any productive reason, but just to impose wasteful reconnection costs on new entrants." *Id.* at 395 (internal quotation marks and citation omitted). The Court recognized that the no-separation rule could allow competing carriers "access to an entire preassembled network." *Id.* However, as the vacated reconfiguration rules were not before the Court, the Court did not address whether the statute requires an incumbent carrier to custom-build a new network for competitors on demand, nor did it consider whether its rationale for reinstating the no-separation rule applied to the reconfiguration rules. Indeed, the reconfiguration rules, which have nothing to do with imposing wasteful burdens on competitors or disassembling an existing network at all, are entirely different in substance.

The *Iowa Utilities Board* case remains pending before the Eighth Circuit on remand, in part to determine the status of the unappealed network reconfiguration rules. In a June 10, 1999 order, the Eighth Circuit directed the parties to address the effect of this Court's decision on a number of FCC rules, including the reconfiguration rules. *See* App. 114a. Incumbent LECs have maintained that the Eighth Circuit's original vacation of those rules still stands, and that the reasons for this Court's reinstatement of the no-separation rule are inapplicable to the reconfiguration rules. The Eighth Circuit heard arguments on September 17, 1999, and a decision is awaited.

C. The WUTC and Ninth Circuit Proceedings Below

In 1996, MFS Intelenet, Inc. ("MFS"), a competitive local exchange carrier ("LEC"), began negotiating with U S WEST, an incumbent LEC, for interconnection in the State of Washington pursuant to section 251 of the Act. The parties were unable to resolve all issues by negotiation, and MFS requested arbitration by the Washington Utilities and Transportation Commission ("WUTC") pursuant to section 252. Following a hearing, the appointed arbitrator issued a report resolving the outstanding issues. In particular, the arbitrator imposed a condition consciously modeled on the FCC reconfiguration rules, requiring U S WEST "to perform . . . the functions necessary to combine requested elements in *any* technically feasible manner either with other elements from [U S WEST's] network, or with elements possessed by MFS," whether or not those combinations exist in U S WEST's own network. App. 12a n.7 (emphasis added). The WUTC approved the arbitrated agreement without substantive opinion. App. 37a-38a.

U S WEST filed this suit in the United States District Court for the Western District of Washington under section 252(e)(6), alleging that the agreement as approved—including the reconfiguration requirement—was unlawful under the Act. The Eighth Circuit's decision vacating the

FCC's reconfiguration rules was handed down in the interim. The district court in this case granted summary judgment for MFS on the relevant issues, holding, *inter alia*, that the reconfiguration requirement was consistent with the Act. App. 31a.[1]

U S WEST then appealed to the Ninth Circuit. While the appeal was pending, this Court issued its decision in *Iowa Utilities Board*, and the Eighth Circuit began its ongoing proceedings to redetermine the validity of the FCC's reconfiguration rules in light of this Court's opinion. The Ninth Circuit, without waiting for the Eighth Circuit to determine the effect of this Court's decision on the FCC rules pending on direct review, then decided for itself the lawfulness of the reconfiguration requirement embodied in those vacated rules. The court below concluded that "it necessarily follows from *AT&T* that requiring U S WEST to combine unbundled network elements is not inconsistent with the Act . . . ." App. 13a. The court below dismissed U S WEST's argument that the Eighth Circuit's ruling vacating the FCC reconfiguration rules, unless and until reversed by the Eighth Circuit on reconsideration, required it to strike the identical reconfiguration provision in the WUTC agreement as unlawful under the Act. Instead, the Ninth Circuit offered its own analysis of the rules' validity after *Iowa Utilities Board*:

> The Supreme Court opinion . . . undermined the Eighth Circuit's rationale for invalidating this regulation. Although the Supreme Court did not

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[1] The district court distinguished the Eighth Circuit's decision on grounds not relevant to the Ninth Circuit's opinion or to this petition. *See* App. 28a-29a (concluding that the Eighth Circuit's concern that competing carriers could obtain finished services at the cost of the constituent network elements, instead of at the wholesale price for finished services, did not apply in this case because the WUTC had imposed a recombination fee equal to the difference between the network element cost and the wholesale rate).

> directly review the Eighth Circuit's invalidation of § 51.315(c)-(f), its interpretation of § 251(c)(3) demonstrates that the Eighth Circuit erred when it concluded that the regulation was inconsistent with the Act. We must follow the Supreme Court's reading of the Act despite the Eighth Circuit's prior invalidation of the nearly identical FCC regulation.

App. 14a. The Ninth Circuit rejected the idea that the Hobbs Act vested the Eighth Circuit with exclusive jurisdiction to determine the validity of the reconfiguration rules, since (it said) it was simply applying the Act rather than the FCC rules under direct review.[2]

U S WEST sought rehearing and rehearing en banc, urging the court below to reconsider its usurpation of the Eighth Circuit's jurisdiction. The court denied rehearing on January 12, 2000.

REASONS FOR GRANTING THE PETITION

I. THE COURT BELOW USURPED THE EIGHTH CIRCUIT'S EXCLUSIVE JURISDICTION TO DETERMINE THE VALIDITY OF THE FCC RULES AND DESTROYED THE UNIFORMITY OF FEDERAL LAW ENSURED BY THE HOBBS ACT.

The Hobbs Act vests the Eighth Circuit with *exclusive* jurisdiction to determine the validity of the FCC's network element reconfiguration rules. This means that no other federal court may consider a direct or collateral challenge to the same rules, or issue any decision that has the practical

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[2] Ironically, the court below did recognize the Hobbs Act's limitation on its jurisdiction with respect to the WUTC's implementation of a different FCC order regarding telephone number portability; the court stated that that order "is not subject to collateral attack in this proceeding." App. 11a (citing 28 U.S.C. § 2342; *FCC v. ITT World Communications, Inc.*, 466 U.S. 463, 468-69 (1984); *Wilson v. A.H. Belo Corp.*, 87 F.3d 393, 397-400 (9th Cir. 1996)).

effect of prejudging the validity of those rules. The Ninth Circuit attempted to skirt this preclusion by purporting to interpret the Telecommunications Act rather than the FCC rules themselves. This gambit, however, ignored the fact that the court was reviewing a WUTC requirement that was itself just an implementation of the FCC rules under consideration in the Eighth Circuit.

The Court should hear this case to make clear that when one circuit is considering the validity of agency rules on direct Hobbs Act review, a second circuit may not supplant that circuit's role—least of all when it is reviewing the decision of a state regulator that is *itself* bound to follow both the agency's rules and the Hobbs Act court's authoritative pronouncements on those rules. The decision below leaves the process of judicial review under the Telecommunications Act in chaos and conflicts with another circuit's (correct) understanding of how such review must proceed.

A. The Hobbs Act Vested the Eighth Circuit with Exclusive Jurisdiction To Decide Whether the Reconfiguration Rules Comply with the Telecommunications Act, and the Ninth Circuit Was Not Free To Ignore That Court's Prior Ruling or Ongoing Proceedings.

The Hobbs Act (also known as the Administrative Orders Review Act), Pub. L. No. 81-901, ch. 1189, 64 Stat. 1129 (1950) (codified in pertinent part at 28 U.S.C. §§ 2341 *et seq.*), governs all challenges to FCC rules. *See* 47 U.S.C. § 402(a) ("Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under [the Act] . . . shall be brought as provided by and in the manner prescribed in chapter 158 of title 28."). The basic purpose of the Hobbs Act is simple: to ensure the uniform interpretation and application of the federal agency rules to which it applies. *See, e.g., Carpenter v. Department of Transp.*, 13 F.3d 313, 316 (9th Cir. 1994) (noting Congress's intent "to increase the speed, efficiency and consistency of judicial review");

Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n, 738 F.2d 901, 907 (8th Cir. 1984) (the Act "avoids the possibility of conflicting litigation where two courts have concurrent jurisdiction to resolve the same issues"), *vacated on unrelated grounds*, 476 U.S. 1167 (1986).[3]

The Hobbs Act achieves this purpose by vesting a single federal court of appeals with *exclusive* jurisdiction to judge the legality of the agency action in question. A party aggrieved by a covered agency order petitions directly to a court of appeals for review. 28 U.S.C. § 2344.[4] That court of appeals "has *exclusive* jurisdiction to enjoin, set aside, suspend (in whole or in part), or *to determine the validity of*" the action under review. *Id.* § 2342(1) (emphases added). *See also id.* § 2349(a) ("The court of appeals in which the record on review is filed . . . has exclusive jurisdiction to make and enter . . . a judgment determining the validity of, and enjoining, setting aside, or suspending, in whole or in part, the order of the agency."). Thus, if a petition to review agency rules has been filed in a federal circuit court pursuant to the Hobbs Act, and that court is in the midst of

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[3] Congress reaffirmed the Act's purpose when it added the Interstate Commerce Commission to the list of agencies subject to Hobbs Act review: "The problem of multiple suits challenging a single ICC order in different locations before different courts[] would disappear and with it the potential for disparity in results and nonuniformity." H.R. Rep. No. 93-1569 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7025, 7033.

The Act also serves related purposes such as vesting review in an appellate panel instead of a single district court judge and ensuring review on the administrative record instead of de novo factfinding. *See Southwestern Bell*, 738 F.2d at 906-07. Congress intended to eliminate the duplication of effort that had occurred under prior law, when agency orders were appealed to district courts with de novo review. *Id.* at 907 (citing H.R. Rep. No. 2122, at 3-4 (1950)).

[4] If petitions for review are filed in multiple circuits within the first ten days after an order is released, the federal judicial panel on multidistrict litigation consolidates the petitions and assigns the consolidated case by lottery to a single circuit. *See* 28 U.S.C. § 2112(a)(3).

proceedings to determine the legality of the rules, no other court may hear a challenge to the same rules.

As this Court and others have made clear, the Hobbs Act's jurisdictional preclusion is broad in scope. In addition to barring *direct* attempts to review agency rules outside the court vested with exclusive jurisdiction, the Hobbs Act also forbids *indirect* challenges that necessarily question the validity of the agency's action. *See FCC v. ITT World Communications, Inc.*, 466 U.S. 463, 468 (1984) (barring district court suit to enjoin FCC from taking action that is the subject of an order under Hobbs Act review); *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 69-70 (1970) (forbidding district court to consider lawfulness of Federal Maritime Commission-approved tariff in rate dispute between shipper and terminal operator, since FMC orders are subject to Hobbs Act review); *Wilson v. A.H. Belo Corp.*, 87 F.3d 393, 399-400 (9th Cir. 1996) (dismissing politicians' suit against broadcasters over election advertising rates, where an FCC order required such complaints to be brought at the agency; hearing the suit would have the same effect as invalidating the FCC order, which could only be done on Hobbs Act review); *Brotherhood of Locomotive Eng'rs v. Boston & Maine Corp.*, 788 F.2d 794, 801 (1st Cir. 1986) (dismissing claim because relief sought by railroad workers' union under Railway Labor Act would have overturned order of Interstate Commerce Commission and therefore "was, in essence, a collateral attack upon the ICC's order").[5] As the cited examples

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[5] *See also Yellow Forwarding Co. v. Atlantic Container Line*, 668 F.2d 350, 354 (8th Cir. 1981) (declining to enjoin enforcement of shipping rate allowances because Federal Maritime Commission had found the allowances to be permitted under approved tariff agreements: "In order to grant such relief the district court would have had to find that the uniform allowances had not been established pursuant to an approved conference agreement . . . . So considered, it is clear that appellant's complaint is an improper attempt to seek collateral review of the merits of the Commission's decision in the district court.") (internal citation

demonstrate, a suit does not have to challenge an agency order directly—nor need the agency be a party—to run afoul of the Hobbs Act's jurisdictional bar; it is enough if the suit "[i]n substance . . . raise[s] the same issues" being considered in a Hobbs Act challenge, *ITT World Communications*, 466 U.S. at 468, or if "the practical effect" of resolving the suit would be "a determination of [a federal order's] validity." *Southwestern Bell*, 738 F.2d at 906.

The Ninth Circuit below did exactly what the Hobbs Act forbade it to do: it "determine[d] the validity of" the FCC's reconfiguration rules while that very question was pending in—and committed to the exclusive jurisdiction of—the Eighth Circuit. 28 U.S.C. § 2342. The court simply declared that the Eighth Circuit's vacation of the rules was no longer good law, in light of this Court's opinion in *Iowa Utilities Board*:

> U S West nevertheless argues that the Eighth Circuit's invalidation of the FCC regulation that required incumbent carriers to combine elements for competing carriers, *see* 47 C.F.R. 51.315(c)-(f), requires this court to conclude that the MFS combination provision violates the Act. The Supreme Court opinion, however, undermined the Eighth Circuit's rationale for invalidating this regulation. Although the Supreme Court did not directly review the Eighth Circuit's invalidation of § 51.315(c)-(f), its interpretation of 47 U.S.C. § 251(c)(3) demonstrates that *the Eighth Circuit erred when it concluded that the regulation was inconsistent with the [Telecommunications] Act.*

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omitted); *Air Transport Ass'n v. Public Utils. Comm'n*, 833 F.2d 200, 206 (9th Cir. 1987) (declining to decide whether Federal Communications Act preempted state regulation because FCC had considered and rejected preemption issue in denying a petition for rulemaking).

App. 13a-14a (emphasis added). The Eighth Circuit—the court most familiar with the *Local Competition Order*, the administrative and judicial record, and the history of the prior proceedings—remains in the process of determining whether it should modify its original decision to vacate the FCC's reconfiguration rules in light of this Court's pronouncements on a different set of rules. For the Ninth Circuit to short-circuit that process and flatly proclaim that its sister circuit "erred" violates the jurisdictional plan of the Hobbs Act.[6]

The fact that the court below was reviewing a state regulator's *implementation* of FCC rules rather than the FCC rules themselves is irrelevant. The WUTC cited no authority for its network element obligations *other than* the FCC rules under review in the Hobbs Act proceedings. *See* App. 55a-57a. Indeed, the language of the WUTC's reconfiguration requirement closely tracks the FCC reconfiguration rules. Once the Eighth Circuit had vacated the reconfiguration rules as contrary to the Telecommunications Act on direct Hobbs Act review, the federal courts reviewing the state regulatory implementations of those rules were bound to follow. The Ninth Circuit could not decide otherwise without determining the very same substantive issues pending before the Hobbs Act court on reconsideration.

The Ninth Circuit's suggestion that a federal court reviewing state arbitral decisions under section 252(e)(6) of the Telecommunications Act need not follow a Hobbs Act court's authoritative construction of the FCC rules that the state regulators have applied puts the Ninth Circuit in direct conflict with the Fourth Circuit. In *GTE South, Inc. v. Morrison*, 199 F.3d 733 (4th Cir. 1999), an incumbent carrier challenged a state arbitrator's application of the FCC's

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[6] The Ninth Circuit, of course, was not the court of appeals vested with exclusive jurisdiction under section 2342 of the Hobbs Act. The Ninth Circuit was hearing this case on an appeal from a district court decision under 28 U.S.C. § 2391, not on a direct petition for review under 28 U.S.C. § 2344.

pricing rules in a section 252(e)(6) proceeding, contending that the rules' methodology was contrary to the Act. The Fourth Circuit squarely held that the judicial review provision of the Telecommunications Act does not authorize such an end run around the Hobbs Act:

> GTE attempts to avoid the Hobbs Act's exclusive review mechanism by invoking § 252(e)(6). Because that section gives district courts (and us on appeal) the authority to determine whether a state arbitration decision meets the requirements of the Act, GTE argues that we must necessarily have the authority to determine the validity of FCC rules if we apply them in evaluating [a state commission's] decision. . . . We disagree. . . . [A] party cannot use an appeal from a district court to circumvent the Hobbs Act's requirement that a challenge to an FCC order is subject only to *direct* review in a court of appeals.

199 F.3d at 742-43. The Fourth and Ninth Circuits have thus taken precisely opposite stances on the authority of a section 252(e)(6) court to supplant the exclusive authority of the Hobbs Act court to determine the validity of FCC rules.[7]

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[7] The Ninth Circuit's decision conflicts with several district court decisions as well. *See AT&T Communications of the Southwest, Inc. v. Southwestern Bell Tel. Co.*, 86 F. Supp. 2d 932, 1999 WL 1128466, at *24 (W.D. Mo. 1999) ("Although th[is] Court . . . would vacate [an FCC rule regarding unbundling of elements] pursuant to the logic of the Supreme Court's decision [in *Iowa Utilities Board*] if it had the authority to do so, the fact remains that this Court lacks jurisdiction to vacate FCC regulations. . . . [The regulation] is still a valid FCC regulation that cannot be challenged in this Court."); *Michigan Bell Tel. Co. v. Strand*, 26 F. Supp. 2d 993, 999-1000 (W.D. Mich. 1998) (Although the complaint challenged provisions of the state commission's order and not the FCC's order, "the logical consequence of this challenge is that the FCC's Order is invalid. Because such determination is sought, this Court is barred by the exclusive jurisdiction provisions of [the Telecommunications Act and the Hobbs Act] from meddling in the exclusive work of the Circuit Courts of Appeals.").

This Court should resolve this conflict by correcting the Ninth Circuit's error.

B. If Permitted To Stand, the Ninth Circuit's Overreaching Will Threaten the Primacy and Uniformity of Federal Law Under the Telecommunications Act.

The Ninth Circuit's decision boils down to an odd proposition: Even though a state regulator arbitrating an interconnection dispute is bound to follow the FCC's rules, *see* 47 U.S.C. § 252(c)(1), and even though a federal court reviewing the arbitral decision must determine whether the state regulator has met this requirement, *see id.* § 252(e)(6), both the state regulator and the federal court are free to *ignore* the vacation of those rules by a Hobbs Act court. This cannot be. If state regulators (and reviewing federal courts) must follow the FCC rules implementing the Telecommunications Act, then they must *also* follow the determination of the validity of those rules by the court vested with exclusive jurisdiction to review them. To rule otherwise takes the Telecommunications Act's primary tool for "bring[ing state regulators] to heel"—section 252(e)(6) judicial review—and turns it into a license for states to make their own federal law. *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. at 378 n.6.

Section 252 of the Telecommunications Act sets the rules for negotiating and arbitrating interconnection agreements, and Congress gave state regulators a limited role in that process. State regulators must follow federal law in arbitrating disputes, and any federal regulatory conditions they impose on carriers in arbitrations must comply with both section 251 and the FCC's rules implementing it. *See* 47 U.S.C. § 252(c)(1), (e)(2)(B). As this Court put it, state regulators are not simply "allowed to do their own thing" in Congress's plan; rather, they "must hew" to the lines drawn

by the FCC and federal courts. *Iowa Utils. Bd.*, 525 U.S. at 378 n.6.

Federal district court review under section 252(e)(6) is the essential check for ensuring that state regulators obey federal law and stay within their permitted role. (Indeed, it is the *only* check, since Congress barred state courts from reviewing these arbitrations. *See* 47 U.S.C. § 252(e)(4).) This Court has acknowledged that the federal district courts are the guardians of the primacy and uniformity of federal law under the Act: "[T]here is no doubt . . . that if the federal courts believe a state commission is not regulating in accordance with federal policy they may bring it to heel." *Iowa Utils. Bd.*, 525 U.S. at 378 n.6. *See also Puerto Rico Tel. Co. v. Telecommunications Regulatory Bd.*, 189 F.3d 1, 14 (1st Cir. 1999) ("The Act exemplifies a cooperative federalism system, in which state commissions can exercise their expertise about the needs of the local market and local consumers, but are *guided by the provisions of the Act and by the concomitant FCC regulations* . . . and *checked by federal court review for consistency with these federal provisions*.") (citations omitted and emphases added).

The Ninth Circuit's decision destroys Congress's plan and its guarantee of uniformity. The decision suggests that federal courts reviewing state arbitral decisions under section 252(e)(6) are free to disregard a Hobbs Act court's vacation of the FCC rules that the arbitrators are supposedly applying. While the whole point of the Hobbs Act is to ensure the uniform application of federal agency rules by consolidating all review in a single court, the Ninth Circuit blows the process wide open, authorizing every federal district court reviewing a state's application of those rules to determine their validity anew.[8]

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[8] The Ninth Circuit has recently magnified this risk by holding that the *only* thing a federal court reviewing a state arbitral decision may consider is whether the state regulator has taken some action that actually violates

This very case illustrates the potential for chaos. The Eighth Circuit's proceedings to reconsider its vacation of the FCC reconfiguration rules are still underway. If the Eighth Circuit decides that the rules are contrary to the Telecommunications Act and should remain vacated, the rules will be vacated on a national basis. But under the decision below here, incumbent carriers' obligations in the Ninth Circuit states may diverge from the rest of the country: the Ninth Circuit has upheld the power of state regulators, acting on the basis of the very rules held invalid by the Eighth Circuit, to impose a reconfiguration duty on incumbent carriers. The Ninth Circuit's decision creates the very situation that the Hobbs Act was enacted to prevent—conflicting rulings in different circuits on the validity of the same agency rules.[9] The Court should grant this petition to restore order to the process of judicial review under the Telecommunications Act.

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an express prohibition of the Act. *See MCI Telecommunications Corp. v. U S WEST Communications*, 204 F.3d 1262, 1268 (9th Cir.), *pet. for reh'g filed* (Mar. 23, 2000). The effect of this holding is to permit state regulators to create new federal law obligations out of whole cloth, regardless of whether they have any affirmative basis in the Act, as long as they are not specifically forbidden. The combined effect of the two decisions is to free state regulators from having to follow the Hobbs Act court or to ground their actions in some specific grant of federal authority—making inconsistent application of federal law a virtual certainty.

[9] A number of district courts also have gone down this wayward path. *See, e.g., MCI Telecommunications Corp. v. Michigan Bell Tel. Co.*, 79 F. Supp. 2d 768, 785 & n.16 (E.D. Mich. 1999) (concluding that this Court impliedly vacated another FCC rule, despite recognizing that the rule's validity is currently under review in the Eighth Circuit); *MCI v. Bell-Atlantic*, 36 F. Supp. 2d 419, 424 & n.4 (D.D.C. 1999) (concluding that this Court impliedly vacated another FCC rule).

II. THE COURT BELOW WRONGLY CONCLUDED THAT THE *IOWA UTILITIES BOARD* DECISION REVIVED THE FCC'S RECONFIGURATION RULES.

In addition to usurping the Eighth Circuit's exclusive jurisdiction to determine the validity of the FCC's rules under this Court's decision in *Iowa Utilities Board*, the Ninth Circuit was wrong on the merits. The court below acknowledged that this Court "did not directly review the Eight Circuit's invalidation of § 51.315(c)-(f)" (App. 14a)—because no party sought such review—but nevertheless opined that *Iowa Utilities Board* undermined the Eighth Circuit's rationale. This was simply wrong: The Court's reasons for upholding a rule barring incumbents from tearing apart their existing networks before giving competitors access to them have nothing at all to do with the vacated rules requiring incumbents to custom-build entirely new configurations of elements upon their competitors' requests. One rule prevents incumbents from imposing wasteful and gratuitous burdens on competitors; the other forces incumbents to expend resources to give their competitors an affirmative leg up in the market.

The Telecommunications Act imposes on an incumbent carrier

> [t]he duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, *nondiscriminatory access to network elements on an unbundled basis* . . . . An incumbent local exchange carrier shall provide such unbundled network elements *in a manner that allows requesting carriers to combine such elements* in order to provide such telecommunications service.

47 U.S.C. § 251(c)(3) (emphases added). As noted, the FCC's rules under this section imposed both a no-

separation-of-elements-already-combined requirement, 47 C.F.R. § 51.315(b), and a reconfigure-to-suit-the-competitor requirement, *id.* § 51.315(c)-(f). In its original decision, the Eighth Circuit vacated both sets of rules, focusing the bulk of its analysis on the reconfiguration rules. The court held that requiring incumbent carriers to reconfigure and combine network elements not already combined in the incumbents' networks "cannot be squared with the terms of subsection 251(c)(3)," because the statutory language "unambiguously indicates that requesting carriers will combine the unbundled elements themselves." *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 813 (8th Cir. 1997). The court explained that, while the Telecommunications Act requires incumbent carriers to provide unbundled elements in a manner that enables competing carriers to combine them, nothing in the Act suggests that incumbents must perform combining for their competitors: "[T]he plain meaning of the Act indicates that the requesting carriers will combine the unbundled elements themselves; the Act does not require the incumbent [carriers] to do *all* of the work." *See id.* The Eighth Circuit then separately addressed the no-separation rule, also finding it unlawful and vacating it. *See id.*

This Court's reinstatement of the no-separation rule did not, and could not, impliedly restore the reconfiguration rules as well. This Court ruled that the FCC could, by virtue of the nondiscrimination requirements in section 251, rationally prohibit incumbents from "disconnect[ing] previously connected elements, over the objection of the requesting carrier, not for any productive reason, but just to impose wasteful reconnection costs on new entrants." *Iowa Utils. Bd.*, 525 U.S. at 395 (internal quotation marks and citation omitted). The Court found that it would be discriminatory to force an incumbent's competitors to recombine elements that, but for the incumbent's having disconnected them, would already be combined, since incumbents would not have to engage in that wasteful exercise.

But the reconfiguration rules have nothing to do with such discrimination. Because these rules deal with elements that are *not* already combined, either the incumbent or its competitor will have to combine those elements to provide a new service; leaving that task to the competitor when it purchases the elements does not discriminate or impose any wasteful costs. Rather, it requires the competitor to incur the *same* costs that the incumbent would incur if it decided to offer a service requiring this new combination. Thus, the Court's rationale for reinstating the no-separation rule simply does not apply to the reconfiguration rules, and the Ninth Circuit's determination of those rules' validity was substantively wrong. More fundamentally, as explained above, the court should not have undertaken this determination at all: only the Eighth Circuit had the power under the Hobbs Act to decide the validity of the reconfiguration rules.

CONCLUSION

The petition for a writ of certiorari should be granted.[10]

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[10] In light of the importance of these issues to the implementation of federal statutes, the Court may wish to invite the Solicitor General to file a brief expressing the views of the United States.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 98-35146
D.C. No. CV-97-00222-WLD

US WEST COMMUNICATIONS,
Plaintiff-Appellant,

v.

MFS INTELENET, INC.; SHARON L. NELSON, CHAIRMAN; RICHARD HEMSTAD, COMMISSIONER; WILLIAM P. GILLIS, COMMISSIONER, IN THEIR OFFICIAL CAPACITIES AS COMMISSIONERS OF THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION; AND WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, (WUTC),
Defendants-Appellees.

No. 98-35203
D.C. No. CV-97-00354-WLD

US WEST COMMUNICATIONS,
Plaintiff-Appellant,

v.

TCG SEATTLE, A LIMITED PARTNERSHIP; ANNE LEVINSON, CHAIRPERSON; RICHARD HEMSTAD, COMMISSIONER; WILLIAM P. GILLIS, COMMISSIONER, IN THEIR OFFICIAL CAPACITIES AS COMMISSIONERS OF THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION; AND WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION,
Defendants-Appellees.

Appeals from the United States District Court
For The Western District of Washington
William L. Dwyer, Distict Judge, Presiding

Argued and Submitted

November 2, 1998—Seattle, Washington

Filed October 8, 1999

Before James R. Browning and Michael Daly Hawkins, Circuit Judges and Milton I. Shadur,[1] District Judge.

Opinion by Judge Browning.

OPINION

Browning, Circuit Judge:

The Telecommunications Act of 1996 (Act) is designed to foster competition in local and long distance telephone markets. The local competition provisions of the Act require incumbent local exchange carriers (defined in 47 U.S.C. § 251(h)(1)) to allow other local exchange carriers access to the incumbent carrier's networks or services to enable them to compete in providing local telephone services: (1) incumbent carriers must interconnect their networks with new entrants "at any technically feasible point," and the interconnection must be "at least equal in quality" to the interconnection the incumbent carrier provides for itself, 47 U.S.C. § 251(c)(2); (2) incumbents must provide nondiscriminatory, unbundled access to network elements[2] in a

[1] The Honorable Milton I. Shadur, Senior United States District Judge, Northern District of Illinois, sitting by designation.

[2] A "network element" is a facility or equipment used in the provision of telecommunications service. See 47 U.S.C. § 153(29).

sale rates, any telecommunications service an incumbent offers at retail, and permit new entrants to resell those services to end-users. *See* 47 U.S.C. § 251(c)(4). The Act prohibits incumbent carriers from imposing unreasonable or discriminatory conditions or limitations on the resale of the services. *See id.*

Incumbent carriers must negotiate in good faith agreements (commonly referred to as interconnection agreements) with competing carriers setting forth particular terms and conditions upon which incumbent carriers will satisfy their duties under the Act. *See* 47 U.S.C. § 251(c)(1). If the parties are unable to reach agreements through good faith negotiations, a party to the negotiation may request that the state utilities commission arbitrate unresolved issues. *See* 47 U.S.C. § 252(b)(1). A state commission may impose terms by arbitration only if the terms meet the substantive requirements of section 251, including regulations implementing that section, and the pricing standards of section 252. *See* 47 U.S.C. § 252(c). After the state commission approves an interconnection agreement, a party to the agreement may bring an action in district court "to determine whether the agreement or statement meets the requirements of the Act. 47 U.S.C. § 252(e)(6).

The Federal Communications Commission (FCC) issued rules implementing the local competition provisions of the Act. *See In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1966*, 11 F.C.C.R. 15499 (Aug. 8, 1996) (*Local Competition Order*). Suits challenging the rules were consolidated in the Eight Circuit. The Eighth Circuit vacated the pricing rules on the ground that the Act authorized state utility commissions, not the FCC, to set rates. *See Iowa Utilities Bd. v. FCC*, 120 F.3d 753, 793-800 (8th Cir. 1997). The court expressly declined to review the pricing rules on the merits. *See id.* at 800. The court also vacated non-pricing rules that required incumbent carriers to combine unbundled network elements for competing carriers, and prohibited incumbent

that required incumbent carriers to combine unbundled network elements for competing carriers, and prohibited incumbent carriers from separating already combined network elements before leasing them to competing carriers.

In relevant part, the Supreme Court reversed the Eighth Circuit's ruling that the FCC did not have jurisdiction to promulgate pricing rules, holding the FCC had jurisdiction to "prescribe such rules and regulations as may be necessary in the public's interest to carry out the provisions of the Act," including the "jurisdiction to design a pricing methodology." *See AT&T Corp. v. Iowa Utilities Bd.*, —— U.S. ——, 119 S. Ct. 721, 729, 733 (1999). The Supreme Court also reinstated the rule prohibiting incumbents carriers from separating already combined network elements. *See id.* at 737-38.

Procedural Background

MFS Intelenet, Inc. (MFS) and TCG Seattle (TCG), competing local exchange carriers, asked US West Communications (US West), the incumbent local exchange carrier, to negotiate an interconnection agreement. The parties were unable to resolve all issues by negotiation, and MFS and TCG requested arbitration by the Washington Utilities and Transportation Commission (Commission). The Commission appointed an arbitrator in each case, and arbitration hearings were held. Arbitrators' reports and decisions were filed and comments and objections received. The Commission concluded the agreements met the requirements of sections 251 and 252 of the Act, and approved them. US West challenged the Commission's decisions and asserted takings claims in district court. The district court held that the agreements complied with the Act and dismissed the taking claims as unripe. US West appealed.

Standard of Review

We review the district court's grant of summary judgment de novo. *See San Diego Gas & Elec. Co. v. Canadian Hunter*

jurisdiction upon district courts to review interconnection agreements for compliance with the Act:

> In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court *to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.*

47 U.S.C. § 252(e)(6) (emphasis added). We apply the same standard the district court should apply, considering de novo[3] whether the agreements are in compliance with the Act and the implementing regulations, *see Orthopaedic Hosp. v. Belshe*, 103 F.3d 1491, 1495 (9th Cir. 1997) (a state agency's interpretation of a federal statute is considered de novo), and considering all other issues under an arbitrary and capricious standard. *See, e.g., US West Communications, Inc. v. Hix*, 986 F. Supp. 13, 19 (D. Colo. 1997) (holding that courts should apply the de novo standard to all issues involving a "determination of the [state commission's] procedural or substantive compliance 'with the requirements of the [Telecommunications Act] and its implementing regulations,' " and an arbitrary and capricious standard to all other issues). We agree with the district court that the agreements complied with the Act and the FCC regulations, and that other decisions of the Commission challenged by US West were not arbitrary and capricious. Although the district court

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[3] US West argues that we should not defer to the Commission on any of its rulings because section 252(e)(6) provides for a *private right of action* instead of an *appeal* to the district court. All district court proceedings are initiated by filing an "action" in district court. *See* Fed. R. Civ. P. 1, 2 & 3. Congress' use of this term in section 252(e)(6) does not affect the proper standard of review.

the wrong standard in its review of some of the issues,[4] the errors were harmless.[5]

Discussion

1. *Ripeness of Challenge to Interim Rates*

US West challenges several of the pricing provisions as inconsistent with pricing standards fixed by the Act. Because the challenged provisions are interim only and may be adjusted by later pricing proceedings, we conclude that these prices are therefore not ripe for review.

Federal courts must refrain from premature adjudication of agency action to avoid "entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Lab. v. Gardner*, 387 U.S. 136, 148 (1967). Principles of federalism lend this doctrine additional force when a federal court is reviewing a state agency decision at an interim stage in an evolving process. *See Wright, Miller & Cooper*, Federal Practice and Procedure: Jurisdiction § 3532.1 n.16 & accompanying text (2d ed. 1984 & Supp. 1998).

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[4] The district court erred in applying the arbitrary and capricious standard to the following issues relating to the agreements' compliance with the Act: (1) charges for number portability, *infra* at 12481; (2) inclusion of deregulated or unregulated services, *infra* at 12485; (3) inclusion of ISP-Bound Traffic, *infra* at 12486; (4) interconnection at certain points, infra at 12490; (5) combination of toll and local traffic, *infra* at 12491.

[5] The district court erred in holding that the doctrine of primary jurisdiction required substantial deference to the Commission's price determination and cost methodology. The doctrine of primary jurisdiction is not applicable. This is not a judicial action independent of agency proceedings. *See Cost Management Serv., Inc. v. Washington Natural Gas Co.*, 99 F.3d 937, 949 (9th Cir. 1996). However, the error was harmless.

The D.C. Circuit, which decides most petitions for review of federal agency actions, explained:

> The primary focus of the ripeness doctrine as applied to judicial review of agency action has been a prudential attempt to time review in a way that balances the petitioner's interest in prompt consideration of allegedly unlawful agency action against the agency's interest in crystallizing its policy before that policy is subjected to judicial review and the court's interests in avoiding unnecessary adjudication and in deciding issues in a concrete setting.

Mississippi Valley Gas Co. v. Federal Energy Regulatory Comm'n (MVGC), 68 F.3d 503, 508 (D.C. Cir. 1995) (quoting *Eagle-Picher Indus. v. EPA*, 759 F.2d 905, 915 (D.C. Cir. 1985)) (internal quotation marks omitted).

"In considering whether a case is ripe for review, a court must evaluate '[1] the fitness of the issues for judicial decision and [2] the hardship to the parties of withholding court consideration.' " *Winter v. California Med. Review, Inc.*, 900 F.2d 1322, 1325 (9th Cir. 1990) (quoting *Abbott*, 387 U.S. at 149). "A claim is fit for decision if the issues raised are primarily legal, do not require further factual development, and the challenged action is final." *Standard Alaska Prod. Co. v. Schaible*, 874 F.2d 624, 627 (9th Cir. 1989). "To meet the hardship requirement, a litigant must show that withholding review would result in direct and immediate hardship and would entail more than possible financial loss." *Winter*, 900 F.2d at 1325 (internal quotation marks omitted).

a. *Fitness of Issues for Judicial Decision*

We conclude that US West's challenge to the interim rates is not yet fit for judicial decision. First, we cannot determine whether these rates are final since the Commission may not have reached a final decision on the rates that will be charged during the period between the effective date of the agreements and the

establishment of permanent rates. The Commission adopted a two-stage process for fixing interconnection rates: interim rates were to be set by arbitration; permanent rates were to be determined in a generic price proceeding. The generic proceeding is still underway. US West challenges the interim rates, but says its concerns would be resolved if TCG and MFS were ordered to compensate US West for any differences between the interim rates and the permanent prices, referred to as an "administrative true-up." US West apparently requested a true-up in arbitration proceedings. The arbitrators' orders cryptically provide that the rates in the agreements "will remain in effect pending the outcome of the Commission's generic pricing proceeding." The Commission's orders approving the arbitrated agreements are similarly ambiguous: "The prices contained in the Agreement are interim prices, subject to replacement by prices adopted in the Commission's generic cost and price proceeding . . . ." When asked at oral argument to clarify whether a true-up might be available, the Commission was noncommittal. Therefore, we must conclude that there is still a possibility the Commission will award a true-up at the conclusion of the generic price proceeding.

Accordingly, we avoid unnecessary adjudication by declining to review the interim prices now.[6] If a true-up is ordered, this

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[6] *Compare MVGC*, 68 F.3d at 509 (finding petition for review unripe in part because of "the possibility that MVGC will obtain relief from the effect of the [challenged] FERC orders in the pending hearings"), and *Placid Oil Co. v. FERC*, 666 F.2d 976, 981 (5th Cir. 1982) (finding petition for review unripe in part because the agency "may have been receptive" to the petitioner's argument in a subsequent proceeding), with *United Distribution Cos. v. FERC*, 88 F.3d 1105, 1183 (D.C. Cir. 1996) (finding petition for review ripe in part because agency had demonstrated that it did not intend to reconsider the relevant ruling or amplify its justifications for the ruling in further proceedings); *Mid-Tex Elec. Coop., Inc. v. FERC*, 773 F.3d 327, 337-38 (D.C. Cir. 1985) (finding petition for review ripe in part because the agency informed the court that the challenged order was the agency's definitive ruling on the relevant issue: "Here the Commission states that its rule binds it to

appeal might become moot, as US West has indicated it would be satisfied with such an order. Even if the appeal does not become moot, either because the true-up is denied or because MFS or TCG appeals the award of a true-up, this court will benefit from the Commission's and the district court's legal analysis of whether a true-up is authorized by the Act and from their assessment of whether it should be imposed in these particular cases. Indeed, TCG indicated at oral argument that it may challenge the legitimacy of the generic price proceeding itself. It may assist us to have all of these legal questions presented at once, after they have been fully considered below and after the factual record has been fully developed in the generic price proceeding. *See MVGC*, 68 F.3d at 508 (concluding that the court "will benefit from deferring review until the agency's policies have crystallized and the question[s] arise[] in some more concrete and final form") (internal quotation marks omitted).

b. *Hardship to the Parties*

Delaying review of the interim rates will not impose an undue hardship on any of the parties. US West indicated at oral argument that it would not object to deferred review, as long as it may renew its appeal at the conclusion of the generic proceeding if the Commission denies a true-up. Clearly, US West may do so. *Cf. MVGC*, 68 F.3d at 509 (explaining that at the conclusion of ratemaking, the court will have "jurisdiction to review the entire proceeding").

TCG objects to continued uncertainty regarding the rates it must pay to US West, which affect the rates it charges its customers. TCG notes that it entered the local phone market and conducted business based on the approved agreements and the interim rates they fixed, and the generic proceeding may not

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accept rates calculated with CWIP in the rate base; its discretion has been exercised and no longer exists.").

conclude before the agreements expired. TCG has known, however, that the rates were subject to judicial review and might be revised in the generic proceeding, at least prospectively. Delay alone ordinarily is not a sufficient hardship to preclude a finding of unripeness. *See Pennzoil Co. v. FERC*, 645 F.2d 394, 399-400 (5th Cir. 1981) (holding that mere delay is an inadequate showing of hardship, absent showing that delay will result in irreparable losses, intrusion into daily business decision-making, or the imposition of a Hobson's choice of whether to comply with a possibly invalid regulation or to violate it in order to challenge it).

Moreover, it is unclear whether declining to review the rates now will significantly delay a final resolution. At oral argument, the parties informed us that the generic proceeding was almost completed. Once it is completed, and following review in the district court, an accelerated schedule for briefing and argument can be set.

Finally, TCG and MFS do not suffer undue hardship since they might be more prejudiced by immediate review of the interim rates than by a possible true-up. It appears that the permanent prices ultimately adopted in the generic price proceeding are likely to be lower than US West's proposed prices. However, if this court in a later appeal of the generic proceeding were to determine that a TCG or MFS proposal adopted in the arbitrated agreements did not comply with the Act, one practical alternative might be to order the Commission to adopt the US West proposal in its place. Therefore, TCG and MFS may actually benefit from our decision to delay review until the conclusion of the generic proceeding.

We conclude that the possible hardship caused by deferring review is outweighed by the factors favoring deferral.

2. *Charges for Interim Number Portability*

US West argues the district court erred in affirming the interim number portability provisions in the agreements because

the assignment of costs based on the number of each exchange carrier's active local numbers violates the Act. The district court upheld the Commission's approval of the provisions because the FCC had approved the methodology. We affirm.

The Act requires US West to provide number portability, defined as the "ability of users of telecommunications services to retain, at the same location, existing telecommunications numbers without impairment of quality, reliability, or convenience when switching from one telecommunications carrier to another." 47 U.S.C. § 153(30). The Act provides that "the costs of establishing . . . number portability shall be borne by all telecommunications carriers on a competitively neutral basis *as determined by the [FCC]*." 47 U.S.C. § 251(e)(2) (emphasis added). The FCC has ruled that a mechanism assigning costs based on each exchange carrier's active local numbers is "competitively neutral." *See In re Telephone Number Portability*, 11 F.C.C.R. 8352, ¶ 135 (July 2, 1996) (*Number Portability Order*), but a mechanism requiring new entrants to bear all the costs of number portability is not. *See id.* at ¶ 138. The FCC order is not subject to collateral attack in this proceeding. The Hobbs Act grants exclusive jurisdiction to courts of appeals to determine the validity of all final orders of the FCC. *See* 28 U.S.C. § 2342; 47 U.S.C. § 402(a); *see also FCC v. ITT World Communications*, 466 U.S. 463, 468-69 (1984); *Wilson v. A. H. Belo Corp.*, 87 F.3d 393, 397-400 (9th Cir. 1996). An aggrieved party may invoke this jurisdiction only by filing a petition for review of the FCC's final order in a court of appeals naming the United States as a party. *See* 28 U.S.C. §§ 2342, 2344.

US West also argues that mandatory sharing of switched access charges required by the MFS Agreement violates the Act. The district court upheld the Commission's approval of a provision requiring US West to share these charges because the Act and the FCC's Number Portability Order permit such sharing.

distance telephone calls over the local exchange carrier's networks to complete the calls. The MFS Agreement requires US West to share with MFS all access charges paid by interexchange carriers to US West, including charges for local transport, local switching, interconnection, and a common carrier line charge. US West argues it should be required to share only the common carrier line charge because MFS provides only final call termination.

The Act states the cost of establishing the number portability system must be borne by all carriers on a "competitively neutral basis." 47 U.S.C. § 251(e)(2). The FCC's *Number Portability Order* stated the "overarching principle is that the carriers are to share in the access revenues received for a ported call." Number Portability Order at ¶ 140. The *Number Portability Order* does not require that US West recover all its costs relating to number portability, but only that all carriers share the costs.

The district court correctly held that the number portability cost recovery provisions do not violate the Act.

3. *Requirement to Combine Unbundled Elements*

The district court's holding sustaining the provision in the MFS Agreement requiring US West to combine unbundled network elements at MFS's request before leasing must be affirmed under the rationale of *AT&T Corp. v. Iowa Utilities Bd.*, —— U.S. ——, 119 S. Ct. 721, 736-38 (1999), sustaining a provision prohibiting an incumbent from separating already-combined elements before leasing.[7]

The Act states that an incumbent carrier must provide

> nondiscriminatory access to network elements on an *unbundled basis* at any technically feasible point on rates,

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[7] The MFS provision states: "USWC agrees to perform and MFS agrees to pay for the functions necessary to combine requested elements in any technically feasible manner either with other elements from [US West's] network or with elements possessed by MFS."

> terms and conditions that are just, reasonable, and nondiscriminatory . . . . An incumbent local exchange carrier shall provide such unbundled network elements *in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.*

47 U.S.C. § 251(c)(3) (emphasis added).

In sustaining a provision that prohibited the incumbent from separating already-combined elements before leasing, the Supreme Court held that the phrase, "on an unbundled basis," does not necessarily mean "physically separated"; an equally reasonable interpretation is that it means separately priced. *AT&T*, 119 S.Ct. at 737. The Court also held that the statutory language requiring incumbent carriers to "provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service" indicates that network elements may be leased in discrete parts, but "does not say, or even remotely imply, that elements must be provided only in this fashion and never in combined form." *Id.* It follows, the Court held, that the FCC regulation prohibiting an incumbent carrier from separating already-combined network elements, *see* 47 C.F.R. § 51.315(b), was not inconsistent with the Act.

It also necessarily follows from *AT&T* that requiring US West to combine unbundled network elements is not inconsistent with the Act: the MFS combination provision does not conflict with the Act because the Act does not say or imply that network elements may only be leased in discrete parts.

US West nevertheless argues that the Eighth Circuit's invalidation of the FCC regulation that required incumbent carriers to combine unbundled elements for competing carriers, *see* 47 C.F.R. § 51.315(c)-(f), requires this court to conclude that the MFS combination provision violates the Act. The Supreme Court opinion, however, undermined the Eighth Circuit's rationale for invalidating this regulation. Although the Supreme

MFS combination provision violates the Act. The Supreme Court opinion, however, undermined the Eighth Circuit's rationale for invalidating this regulation. Although the Supreme Court did not directly review the Eighth Circuit's invalidation of § 51.315(c)-(f), its interpretation of 47 U.S.C. § 251(c)(3) demonstrates that the Eighth Circuit erred when it concluded that the regulation was inconsistent with the Act. We must follow the Supreme Court's reading of the Act despite the Eighth Circuit's prior invalidation of the nearly identical FCC regulation.

4. *Inclusion of Deregulated/Unregulated Services*

US West argues the district court erred in failing to exempt deregulated and unregulated services from the resale provisions of the MFS Agreement.

The FCC instructed the parties to examine the incumbent carrier's retail tariffs to determine which services the incumbent carrier must provide for resale. *See Local Competition Order* at ¶ 872 ("State commissions, [incumbent carriers] and resellers can determine the [telecommunications] services that an [incumbent carrier] must provide at wholesale rates *by examining that [local exchange carrier's] retail tariffs.*") (emphasis added). The *Local Competition Order,* however, only tells the parties they may examine the incumbent's retail tariffs to determine which services an incumbent carrier must provide for resale, and does not say a state commission may impose the duty to sell for resale only telecommunications services covered by the incumbent's retail tariffs. *See id.*

The plain language of the Act imposes on incumbent carriers the duty "to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers." 47 U.S.C. § 251 (c)(4)(A) (emphasis added). The plain language does not exempt unregulated and deregulated services from the statutory

definition of telecommunication services[8] or the duty to sell those services for resale. "If the intent of Congress is clear from the face of the statutory language, we must give effect to the unambiguously expressed Congressional intent." *Saipan Stevedore Co., Inc. v. Director of Workers Compensation Programs*, 133 F.3d 717, 722 (9th Cir. 1998) (citing *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984)).

We affirm the district court's decision that deregulated and unregulated telecommunication services are subject to the resale provisions.

5. *Inclusion of ISP-Bound Traffic*

US West argues the district court erred in permitting the inclusion of "ISP-Bound Traffic" (a telephone call from an end-user to the end-user's Internet Service Provider[9]) in the reciprocal compensation provisions of the MFS Agreement. The FCC has held parties are bound by interconnection agreements that include ISP-Bound Traffic in their reciprocal compensation provisions and are approved by a state commission. *See In re Implementation of the Local Competition Provisions in the Tele-*

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[8] A "telecommunications service" is defined as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C. § 153(46).

[9] An Internet service provider (ISP) "is an entity that provides its customers the ability to obtain on-line information through the Internet. ISPs purchase analog and digital lines from local exchange carriers to connect to their dial-in subscribers. Under one typical arrangement, an ISP customer dials a seven-digit number to reach the ISP server in the same local calling area. The ISP, in turn, combines computer processing, information storage, protocol conversion, and routing with transmission to enable users to access Internet content and services." *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996: Inter-Carrier Compensation for ISP-Bound Traffic*, 14 F.C.C.R. 3689 at ¶ 4 (Feb. 26, 1999).

communications Act of 1996: Inter-Carrier Compensation for ISP-Bound Traffic, 14 F.C.C.R. 3689 (Feb. 26, 1999) (*ISP Ruling*). Because the Commission has approved the MFS Agreement which provided reciprocal compensation for ISP-Bound Traffic, we affirm.

The Act imposes a duty upon all incumbent carriers to "establish reciprocal compensation arrangements for the transport and termination of telecommunications." 47 U.S.C. § 251(b)(5). The FCC concluded that the reciprocal compensation provisions applied only to "local telecommunications traffic." *Local Competition Order* at ¶ 1412. The FCC issued a declaratory ruling that "ISP-Bound Traffic is jurisdictionally mixed and appears to be largely interstate." *ISP Ruling* at ¶ 1. At first glance, the FCC's conclusion that ISP-Bound Traffic is interstate supports the exclusion of ISP-Bound Traffic from the reciprocal compensation provisions. Arguably, if ISP-Bound Traffic is interstate, it cannot also be "*local* telecommunications traffic." *Local Competition Order* at ¶ 1412 (emphasis added). However, the FCC held the existing interconnection agreements providing for reciprocal compensation of ISP-Bound Traffic were binding on the parties.[10] The FCC said:

> [Our jurisdictional] conclusion, however, does not in itself determine whether reciprocal compensation is due in any particular instance . . . . [P]arties may have agreed to reciprocal compensation for ISP-Bound Traffic, or a state commission, in the exercise of its authority to arbitrate interconnection disputes under section 252 of the Act, may have imposed reciprocal compensation obligations for this traffic. In the absence, to date, of a federal rule regarding the appropriate inter-carrier compensation for this traffic,

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[10] In the ISP Ruling, the FCC gave notice of a proposed rulemaking regarding inter-carrier compensation for ISP-Bound Traffic. The obligation to pay such compensation in existing interconnection agreements could be altered by future rules promulgated by the FCC.

> *we therefore conclude that parties should be bound by their existing interconnection agreements, as interpreted by state commissions.*

ISP Ruling at ¶ 1 (emphasis added).[11]

US West may not collaterally attack the FCC's decision that parties are bound by existing interconnection agreements.[12] As noted, the Hobbs Act grants exclusive jurisdiction to courts of appeals to determine the validity of all final orders of the FCC.[13] *See* 28 U.S.C. § 2342; 47 U.S.C. § 402(a); *see also ITT World Communications*, 466 U.S. at 468-69. It is irrelevant that US West filed this action with the district court prior to the issuance

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[11] The FCC stated that the ISP Ruling "might cause some state commissions to reexamine their conclusion that reciprocal compensation is due." *ISP Ruling* at ¶ 27. Even if the Commission did reconsider its conclusion that reciprocal compensation is due under the MFS Agreement, the parties could not attack the reciprocal compensation provisions in this forum. *See Wilson v. A.H. Belo Corp.*, 87 F.3d 393, 400 (9th Cir. 1996). In fact, the Commission did reconsider its conclusion and held reciprocal compensation is due for ISP-Bound Traffic. *See Third Supplemental Order Granting WorldCom's Complaint*, 1999 WL ____ (Wash. U.T.C. May _, 1999).

[12] US West argues that the FCC "abdicated its responsibility" by finding that even though ISP-Bound Traffic is jurisdictionally interstate, parties under existing interconnection agreements approved by state commissions must pay inter-carrier compensation for ISP-Bound Traffic (if such traffic is included in the reciprocal compensation provisions). However, this argument should be made in a direct attack of the ISP Ruling. In fact, US West and other telecommunications carriers have filed such actions in the D.C. Circuit seeking direct review of the ISP Ruling. *See US West v. FCC*, No. 99-1095 (filed March 8, 1999); *Bell Atlantic v. FCC*, No. 99-1094 (D.C. Cir. filed March 8, 1999); *MCI WorldCom v. FCC*, No. 99-1097 (D.C. Cir. filed March 8, 1999).

[13] US West argues that the Hobbs Act does not apply because section 252(e)(6) of the Act grants jurisdiction to federal district courts to determine whether the interconnection agreements comply with the Act and the FCC regulations. Section 252(e)(6) does not, however, grant jurisdiction to federal district courts to review the validity of FCC regulations.

of the ISP Ruling. "Once the [ISP Ruling] became final, it divested [this court] of jurisdiction to consider the issues decided in the [ISP Ruling]." *Wilson*, 87 F.3d at 400.

We affirm the district court's decision to include ISP-Bound Traffic in MFS Agreement's reciprocal compensation provisions because the ISP Ruling requires US West and MFS to be bound by the MFS Agreement which includes ISP-Bound Traffic in its reciprocal compensation provisions.[14]

6. *Treatment of MFS Switch as a Tandem Switch*

US West argues that the district court erred in characterizing the MFS switch as a tandem switch. Both MFS and US West presented evidence in the arbitration hearing regarding the geographic area the MFS switch serves and the functions it performs. The Commission's classification of MFS's switch as a tandem switch was not arbitrary or capricious.[15] The Commission properly considered whether MFS's switch performs similar functions and serves a geographic area comparable to US West's tandem switch. *See Local Competition Order* at ¶ 1090. The Commission found that MFS's switch "is comparable in geographical scope" to US West's tandem switch, and "performs the function of aggregating traffic from widespread remote locations" as a tandem switch does.

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[14] Based on different reasoning, the Seventh Circuit also held the ISP Ruling did not prohibit a state commission from including ISP-Bound Traffic in the reciprocal compensation provisions of an interconnection agreement. *See Illinois Bell Tel. Co. v. WorldCom Techs.*, 179 F.3d 566 (7th Cir. 1999). The Seventh Circuit held the ISP-Ruling permits state commissions to decide whether ISP Bound-Traffic should be included in the interconnection agreement's reciprocal compensation provisions "at least until the time a [federal] rule is promulgated." *Id.* at 574.

[15] We review the Commission's decision under the arbitrary and capricious standard. Whether MFS's switch is a tandem switch is not a determination of compliance with the requirements of the Act and its implementing regulations.

US West challenges the rates the Commission required it to pay MFS for using its tandem switch, claiming they are not "reasonable approximations" of the additional costs MFS will incur for terminating US West's calls as required by 47 U.S.C. § 252(d)(2). The rates adopted by the Commission were the rates US West proposed for terminating MFS's calls. Though US West and MFS will not incur precisely the same costs for terminating the other carrier's calls, the district court held the rates were "reasonable approximations" of the additional costs incurred by MFS, and therefore complied with the Act. We affirm.

7. *Interconnection at Certain Points*

US West argues the district court erred in upholding provisions in the MFS Agreement permitting a single point of interconnection (at the tandem switch) per local access and transport area, and in upholding provisions in the TCG Agreement permitting TCG to interconnect at US West access tandem switches and at local and end office switches.

The Act requires an incumbent carrier –

> to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network—(A) for the transmission and routing of telephone exchange service and exchange access; (B) *at any technically feasible point within the carrier's network.*

47 U.S.C. § 251(c)(2) (emphasis added).

The plain language requires local exchange carriers to permit interconnection *at any technically feasible point* within the carrier's network. An incumbent carrier denying a request for interconnection at a particular point must prove interconnection at that point is not technically feasible. *See* 47 C.F.R. § 51.305(e). US West provided no evidence that interconnection at its tandem or local or end office switches was not technically feasible.

In any event, these regulations state that interconnection at a tandem switch is technically feasible, *see* 47 C.F.R. § 51.305(a)(2)(iii), and these regulations are not subject to collateral attack in this proceeding. *See* 28 U.S.C. § 2342(1); *ITT World Communications*, 466 U.S. at 468-69.

8. *Combination of Toll and Local Traffic*

US West argues the district court erred in upholding the provisions in the TCG Agreement permitting TCG to combine local and toll traffic on two-way trunks. The FCC regulations require an incumbent carrier to provide two-way trunking where the competing carrier has insufficient traffic to justify use of separate one-way trunks and two-way trunking is technically feasible. *See Local Competition Order* at ¶ 219; *see also* 47 C.F.R. § 51.305(f) ("If technically feasible, an incumbent [carrier] shall provide two-way trunking upon request."). The regulation is not subject to collateral attack in this proceeding. *See* 28 U.S.C. § 2342(1); *ITT World Communications*, 466 U.S. at 468-69.

9. *Providing Adequate Security at Collocation Sites*

Because of the sensitive nature of the technology at incumbent carriers' facilities, the FCC permits incumbent carriers to "require reasonable security arrangements" to separate a collocating carrier's space from the incumbent carrier's facilities. 47 C.F.R. §51.323(i). US West proposed providing escorts, at TCG's expense, while TCG employees were in US West's facilities. The Commission concluded less costly arrangements would be adequate, and adopted TCG's proposal to permit US West to require screening and bonding in reasonable amounts for TCG personnel in US West facilities.

We affirm the district court's holding that the bonding and screening provision provided a "reasonable" security arrangement as required by the Act and its implementing regulations. *See* 47 U.S.C. §251(c)(6); 47 C.F.R. §51.323(i). This is the same security standard US West imposes on its own workforce. The Commission's decision that this arrangement was prefer-

able to US West's suggestion of escorts was not arbitrary and capricious.

10. *Requiring US West to Enter Into Future Agreement on Access to Poles, Conduits, Ducts, Rights of Way*

We uphold a provision in the TCG Agreement[16] requiring TCG and US West to negotiate a future agreement for pole attachment and conduit usage as an "appropriate condition" to implement the statutory duty of US West to afford access to poles, ducts, conduits and rights-of-way. *See* 47 U.S.C. §§ 251(b)(4); 252(b)(4)(C); 252(c)(1). US West argues that the Commission may impose the duty, but may not require US West to enter into a future agreement to provide such access.

State commissions impose "appropriate conditions as required" only to "ensure that such resolutions and conditions meet the requirements of section 251." 47 U.S.C. §§ 252(b)(4)(C), 252(c)(1). Section 251 lists many duties of incumbent carriers, including the "duty to afford access to the poles, ducts, conduits, and rights-of-way of the [incumbent] carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224." 47 U.S.C. § 251(b)(4).

Because US West and TCG could not agree to a provision regarding US West's duty to afford TCG access to poles and conduits, requiring the parties to enter into a future agreement was appropriate to ensure US West fulfills its duty to provide access.[17]

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[16] The TCG Agreement states: "Parties agree to negotiate and execute a separate agreement for pole attachment and conduit usage within 30 days of either Party requesting the other to negotiate such an agreement."

[17] Generally, an agreement to agree in the future is not enforceable. *See Kapetan v. Kelso*, 481 P.2d 24, 25 (Wash. App. 1971) (quoting *Sandeman v. Sayres*, 314 P.2d 428,429 (Wash. App. 1957) ("An agreement for an agreement, or in other words, an agreement to do something which requires a fur-

Takings Claims

US West argues that the Commission's imposition of arbitration terms constituted a taking of US West's property without just compensation, because the rates included in the agreements do not provide for full cost recovery. The district court concluded this Fifth Amendment claim was not ripe and dismissed it. We affirm.

In *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), the Supreme Court held that a regulatory taking claim against a state is not ripe until (1) the state agency imposing the allegedly confiscatory regulation has taken final action against the plaintiff's property and (2) the plaintiff has pursued all available remedies under state law. *See id.* at 186-97. Because the rates included in the agreements approved by the Commission are interim rates and US West may receive retroactive compensation for the interim period, the agency has not taken final action on the allegedly confiscatory rates and the takings claim is not ripe. Moreover, because Washington law provides a remedy for takings, *see* Washington State Const. art. I, § 16; *see also, Manufactured Housing Communities. v. Washington*, 951 P.2d 1142 (Wash. App. 1998), US West must pursue that remedy before bringing an action under the Fifth Amendment in federal court.

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a further meeting of the minds of the parties and without which it would not be complete is unenforcible [sic]."); 1 Farnsworth on Contracts § 3.26 at 345 (1998) (generally an agreement to negotiate is not enforceable); 1 Williston on Contracts, § 4.26 at 585 (1990) (generally an agreement to agree is not enforcable). This general rule does not apply where a state commission, pursuant to a federal statute, arbitrates and makes a *binding* decision on terms which are included in an interconnection agreement. *See* 47 U.S.C. 252(b)(1). A "meeting of the minds" is not necessary to bind parties to the terms of an interconnection agreement which results from arbitration and a binding decision of a governmental agency.

US West argues that the Act effects a physical taking of its property, rather than a regulatory taking, but does not explain how this difference affects the ripeness of its claim. A court often must await final agency action before it can determine if a taking has occurred, because it must assess whether the regulation has deprived the property owner of all economically viable use of the property. In physical taking cases, whether a taking has occurred usually is not disputed. Even if the taking is established, however, a taking claim is not ripe until the state has taken final action on the plaintiff's request for just compensation. No court could determine whether US West will receive just compensation until the pricing issues have been finally resolved. Even after the Commission approves permanent prices, US West must pursue its state remedies before a federal court can determine whether the state has provided just compensation.[18]

We affirm the district court's dismissal of US West's takings claims because they are not ripe for review.

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[18] US West argues it is not necessary to present its claims in state court before seeking relief in federal court, citing *US West Communications, Inc. v. TCG Oregon*, D.N. 97-858-JE (D. Or. 1998), *reprinted in part in* 98-35203 Blue Br. at App. 33-38 (relying on *Dodd v. Hood River County*, 59 F.3d 852 (9th Cir. 1995)). *Dodd* held that *Williamson* did not require plaintiffs to pursue Fifth Amendment takings claims in state court before seeking relief in federal court. *See id.* at 859. *Williamson*, we explained, only requires plaintiffs to pursue state remedies before bringing a Fifth Amendment claim. *See id.* As noted above, Washington law does provide an independent remedy for takings, and US West must pursue that remedy before seeking relief under the Fifth Amendment.

APPENDIX B

[Filed Jan. 7, 1998]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C97-222WD

U S WEST COMMUNICATIONS, INC.,
Plaintiff,

v.

MFS INTELENET, INC., *et al.*
Defendants.

ORDER ON MOTIONS
FOR SUMMARY JUDGMENT

I. INTRODUCTION

This action is brought by U S West Communications, Inc. ("US West") pursuant to the Telecommunications Act of 1996 (the "Act"), 47 U.S.C. § 252(e)(6), for judicial review of an agreement approved by the Washington Utilities and Transportation Commission (the "WUTC") concerning interconnection between US West and MFS Intelenet, Inc. ("MFS"), an entrant into a local telecommunications market. The defendants are MFS and the WUTC and its commissioners. The Federal Communications Commission ("FCC") has filed a brief *amicus curiae*.

Pursuant to the Act, entrants into a local telecommunications market may demand the following from an incumbent local ex-

change carrier ("LEC") : (1) interconnection with its local network; (2) access to its individual "network elements", such as routers and switches, "at cost"; and (3) at wholesale, rights to the services the incumbent LEC offers its customers at retail. 47 U.S.C. § 251(c)(2)-(4).

On February 8, 1996, MFS requested access negotiations with US West. The Act requires both parties to negotiate in good faith. 47 U.S.C. §§ 251(c)(1), 252(a)(1). When negotiations failed to produce an agreement, MFS requested, and was afforded, arbitration as authorized by the Act. 47 U.S.C. § 252(b). An arbitrator was appointed, held hearings, and issued a decision. On December 9, 1996, the parties submitted an interconnection agreement reflecting the arbitration decision. The WUTC approved the agreement on January 8, 1997. Following that approval, US West brought this action pursuant to 47 U.S.C. § 252(e)(6), which provides:

> In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.

All parties have moved for summary judgement. The materials filed, and the arguments of counsel heard on December 4, 1997, have been fully considered. Because there is no genuine issue of material fact for trial, the case may be decided on summary judgment as a matter of law pursuant to Fed. R. Civ. P. 56.

II. SCOPE AND STANDARD OF REVIEW

While the Act, at section 252(e)(6), authorizes judicial review of "the agreement," review necessarily extends to "the various decisions made by the [state commission] throughout the arbitration period which later became part of the agreement. . . ."

GTE South Inc. v . Morrison, 957 F. Supp. 800, 804 (E.D. Va. 1997).

As to the record to be reviewed, the Supreme Court has held that "in cases where Congress has simply provided for review, without setting forth the standards to be used or the procedures to be followed . . . consideration is to be confined to the administrative record and . . . no *de novo* proceeding may be held." *United States v. Carlo Bianchi & Co.,* 373 U.S. 709, 715 (1963). Moreover, the Act was intended to facilitate the rapid entry of new competitors into local telecommunications markets. *See Iowa Utilities Bd. v. FCC,* 120 F.3d 753, 791 (8th Cir. 1997). That intent would be frustrated by the reception of new evidence in the reviewing court . Review is thus limited to the administrative record.

As to the standard of review to be applied, a state agency's interpretations of federal law are reviewed *de novo. See Orthopaedic Hosp. v. Belshe,* 103 F.3d 1491, 1495-96 (9th Cir. 1997). *Chevron* deference (*see Chevron USA v. Natural Resources Defense Council,* 467 U. S. 837 (1984)), is not appropriate where as many as fifty state commissions will be applying the Telecommunications Act. Questions of federal law will be reviewed *de novo.*

The WUTC's findings of fact are a different matter. Substantial deference should be afforded to a state commission's findings because the Act gives it original jurisdiction in the area of rate-setting. *See* 47 U.S.C. § 252(c)(2). Principles of judicial discretion are strongest where the administrative body has primary jurisdiction over the precise matters the court is asked to decide. *See West Coast Truck Lines, Inc. v. Weyerhaeuser Co.,* 893 F.2d 1016 (9th Cir. 1990).

Iowa Utilities Board v. FCC makes clear that the state commissions have original jurisdiction over the setting of prices, including discretion to choose the methodology for calculating cost, as long as the terms of the Act are not violated. 120 F.3d at

794. The Eighth Circuit rejected an FCC order requiring state commissions to apply so-called TELRIC methodology to determine prices; the FCC may not "preempt any state pricing regulation that would employ a different methodology." *Id.* at 798, n. 19.

The choice of pricing and cost methodology thus rests with the commission. Its determinations in those respects must be treated as fact findings and reviewed to test whether they are arbitrary and capricious. With that deferential standard, a reviewing court under the Administrative Procedures Act (analogous here) is to consider whether the agency's decision was based on consideration of the relevant factors and whether there has been a clear error of judgment. *See City of Carmel-by-the-Sea v. United States Dep't of Transp.*, 95 F.3d 893, 899 (9th Cir. 1996). The court may not substitute its judgment for that of the agency. *Id.*

III. SPECIFIC CLAIMS

The prices set in the agreement approved by the WUTC are interim prices; that is, they are subject to change during the agency's generic price and cost proceeding. It has not been shown that the WUTC used any erroneous interpretation of the Act. As to US West's specific claims:

1. The WUTC's approval of the interim unbundled loop price of $13.37 was not arbitrary or capricious. This price was chosen based on substantial information, including the WUTC's "Fifteenth Supplemental Order", Docket No. UT-950200 (recommended price: $13.38), US West's proposed tariff in another proceeding, Docket No. UT- 941464 (maximum proposed price: $19.24), and the FCC's proposed proxy price for Washington ($13.37), *see First Report and Order, Implementation of the Local Competition Provisions in the Telecommunication Act of 1996*, Appendix B, CC Docket No. 96-98 (Aug. 8, 1996), 11 FCC Rcd 15499, at ¶¶ 788-794 (hereinafter "FCC Order").

US West argues that the WUTC violated section 252(d)(1) of the Act by referring to a "rate-of-return or other rate based proceeding", i.e. the Fifteenth Supplemental Order. But the Fifteenth Supplemental Order was based not on rates of return but on an incremental cost methodology called TSLRIC. *See* Arbitrator's Report at 5. This is the type of methodology recommended in the FCC Order at paragraphs 630 and 635.

The company also argues that use of the FCC proxy price was improper in light of *Iowa Utilities Board v. FCC*, 120 F.3d 753 (8th Cir. 1997). The Eighth Circuit held, however, that the FCC did not have jurisdiction to make *rules* regarding interconnection prices. The decision did not affect the validity of the underlying methodology used by the FCC, which can still be informative. The WUTC made clear it was "free . . . to disregard those specific requirements" if it chose to, and that it was considering the proxy prices for their underlying methodology.

2. The WUTC did not act arbitrarily or capriciously in rejecting US West's request to impose special charges for construction costs and conditioning. It found that US West had offered no evidence of actual construction costs, or of a proper formula to use, or of how costs should be allocated among customers and competitors. WUTC's Order at 16-17.

3. US West has not shown that the agreement violates the Act by permitting "sham unbundling." "The Act contemplates that an entrant may provide service to its customers by combining an LEC's network elements. *See* § 251(c)(3); *Iowa Utility Board*, 120 F.3d at 814. MFS is not required to provide any of its *own* elements in order to engage in rebundling. FCC Order at ¶ 328.

US West argues, nevertheless, that the agreement violates the Act by requiring US West to do the rebundling for MFS. The *Iowa Utilities* case rejected an FCC rule compelling incumbents to recombine network elements for an entrant (*see* 120 F. 3d at 813; amendment to the second *Iowa Utilities* decision, 1997 WL 658718 (October 14, 1997)), but the reasoning that led to that

holding does not apply here. The Eighth Circuit emphasized that compelled recombination would undermine the difference between wholesale prices for finished service and the "at-cost" price paid for network elements. 120 F.3d at 813. Here, any unfair cost arbitrage is precluded by use of a recombination fee equal to the difference between the cost and the wholesale rate for finished service.

4. The WUTC's approval of a wholesale discount of 21% off retail price was not arbitrary or capricious. The agency relied on the FCC's recommended range of 17-25%. *See* FCC Order at ¶¶ 932-933. US West's proposal was properly rejected as not complying with section 252(d)(3) of the Act, which requires the parties to start with the retail price and deduct costs avoided ("top down" pricing). The WUTC reasonably characterized US West's method as improper "bottom up" pricing, in which expenses are added together to determine a "wholesale" price.

5. The WUTC's finding that the unregulated and deregulated services are "telecommunications services" was not arbitrary or capricious. The agency correctly applied the Act in denying US West's claim that it is not required to sell unregulated or deregulated services. The Act requires incumbent LECs to "offer for resale at wholesale rates any telecommunications service that the carrier provides at retail." 47 U.S.C. § 251(c)(4). The definition of telecommunications services is broad. 47 U.S.C. § 153 (46).

6. The WUTC's finding that MFS's switches function as tandem switches more than as end office switches was not arbitrary or capricious. The commission determined the cost of call termination accordingly. In doing so, it did not violate the Act when it relied on approximations of costs submitted by MFS; rates need only be based on "reasonable approximations." 47 U.S.C. § 252 (d)(2)(A)(ii).

7. The WUTC did not act arbitrarily or capriciously in deciding not to change the current treatment of ESP call termination from reciprocal compensation to special access fees. The deci-

sion was properly based on FCC regulations which exempt ESP providers from paying access charges. *See* 47 C.F.R. pt. 69.

8. The WUTC did not act arbitrarily or capriciously in choosing MFS's proposed division of "switched access charges" for long distance calls which are delivered to the ported numbers of each company. FCC regulations require carriers to share the switched access revenues received for a ported call. *First Report and Order and Further Notice of Proposed Rulemaking, Telephone Number Portability*, CC Docket No. 95-116 (July 2, 1996), 11 FCC Rcd 8352, at ¶ 140. The methodology employed for sharing access charges is left to the discretion of the commission.

9. The WUTC did not act arbitrarily or capriciously in approving a cost recovery mechanism for number portability based on the number of active local numbers each company has. The FCC has indicated that it approves portability surcharges computed on that basis. Id. at ¶¶ 130, 136. It is within a commission's discretion to approve a method based on the FCC's recommendation.

10. The WUTC did not act arbitrarily or capriciously in approving MFS's request for a single interconnection point per LATA. The agency correctly applied the Act when it limited its review to the technical feasibility of the LATA connection approved in the agreement. *See* 47 U.S.C. § 251(c)(2)(B) and FCC Order at ¶ 209. US West's argument that the WUTC had not considered the cost of minimal LATA connections by MFS was correctly rejected. "A determination of technical feasibility does not include consideration of economic, accounting, [or] billing . . . concerns." 47 C.F.R. § 51.5. US West presented no evidence on the issue of technical feasibility of MFS's chosen points of connection.

11. US West's due process claims are without basis. The company has failed to show that any finding of fact was arbitrary and capricious, or that any error of law was committed. *Yang v. Shalala*, 22 F.3d 213, 217 (9th Cir. 1994), cited by US West, is

not controlling because here the arbitrator and the WUTC based their decisions on the evidence submitted by the parties.

In sum, it has not been shown that the WUTC or the arbitrator acted arbitrarily or capriciously, or contrary to law, in making any relevant determination, or that the agreement violates the Act. Accordingly, US West's motion for summary judgment is denied. Defendants' motions for summary judgment are granted except as to the taking claim, discussed below.

IV. US WEST'S TAXING CLAIM

US West claims that the WUTC's approval of the agreement amounts to an unconstitutional taking. A taking claim under the United States Constitution is not ripe until (a) there is a final decision by the state regarding the property; and (b) the plaintiff has attempted to obtain just compensation for the property in state court. *Williamson Planning Comm'n v . Hamilton Bank*, 473 U.S. 172, 186-97 (1985). These requirements are not met here, and the taking claim, because it is not ripe, must be dismissed without prejudice.

V. CONCLUSION

For the reasons stated, defendants are awarded summary judgment as to all claims except US West's taking claim, which will be dismissed without prejudice. Judgment will be entered accordingly.

The clerk is directed to send copies of this order to all counsel of record.

Dated: January 6, 1998.

/s/ William L. Dwyer
WILLIAM L. DWYER
United States District Judge

APPENDIX C

[Service Date Jan. 8, 1997]

BEFORE THE WASHINGTON UTILITIES
AND TRANSPORTATION COMMISSION

Docket No. UT-960323

In the Matter of the Petition for Arbitration
of an Interconnection Agreement Between

MFS COMMUNICATIONS COMPANY, INC.
AND US WEST COMMUNICATIONS, INC.

Pursuant to 47 USC § 252

ORDER APPROVING NEGOTIATED AND
ARBITRATED INTERCONNECTION AGREEMENT

I. INTRODUCTION

A. Procedural History

On February 8, 1996, MFS Communications Company, Inc. ("MFS") requested negotiations with U S WEST Communications, Inc. ("USWC") for interconnection under the terms of the Telecommunications Act of 1996, Public Law No. 104-104, 101 Stat. 56, *codified* at 47 USC § 151 et seq. (1996) (the "1996 Act" or "the Act").

On June 24, 1996, MFS timely filed with the Washington Utilities and Transportation Commission ("Commission") and served on USWC, a petition for arbitration pursuant to 47 USC § 252(b)(1): The matter was designated Docket No. UT-960323. On June 28, 1996, the Commission entered an Order on Arbitra-

tration Procedure appointing Simon Ffitch as the arbitrator for this proceeding and establishing certain procedural requirements.

USWC filed its response to the petition. Petitions to intervene were filed by AT&T Communications of the Pacific Northwest, Inc. and Telephone Ratepayers Association for Cost Based and Equitable Rates. The petitions were denied in the Arbitrator's Second and Third Procedural Orders respectively.

"Final offer" (or "last best offer") arbitration was adopted for this arbitration pursuant to the Arbitrator's Fourth Procedural Order. In preparing the arbitration report in this matter, the arbitrator selected between the parties' last proposals as to each unresolved issue, selecting the proposal which is most consistent with the requirements of state and federal law and Commission policy. The arbitrator stated he would choose either an entire proposal, or choose between parties' proposals on an issue-by-issue basis. In the event that neither proposal was consistent with law or Commission policy, the arbitrator stated he would render a determination in keeping with those requirements. No party objected to the adoption of "last best offer" arbitration in the Arbitrator's Fourth Procedural Order.

A hearing was held before the arbitrator on September 18 and 19, 1996, at the offices of the Commission in Olympia, Washington. MFS was represented by Douglas Bonner, attorney at law. USWC was represented by Ed Shaw and Lisa Anderl, attorneys at law. Following the hearing, the parties filed final briefs and final offers on October 2 and 8.

On November 8, 1996, the Arbitrator's Report and Decision was issued resolving the disputed issues presented in the final briefs and offers. See attached, Appendix A. The parties were instructed to submit an interconnection agreement in accordance with the Arbitrator's Report and Decision within 30 days.

On December 9, 1996, MFS filed a Memorandum Requesting Approval of Arbitrated Interconnection Agreement. On the same

Agreement and a Request to Adopt, Modify, and Reject the Interconnection Agreement. Also on December 9, 1996, the parties filed a signed Arbitrated Interconnection Agreement for the State of Washington. Copies of the requests for approval were served on the Commission's service list for this proceeding to allow for comment by interested persons. Written comments were filed by Telephone Ratepayers Association for Cost-Based and Equitable Rates (TRACER).

The Commission reviewed the proposed Arbitrated Interconnection Agreement, the issues presented by the Arbitration Report and Decision, the parties filings and the record herein.

On January 6, 1997, the Commission held an open meeting at its Main Hearing Room in Olympia, Washington to consider the request for approval of the Arbitrated Interconnection Agreement. Commission staff presented its recommendation that the agreement be approved. Oral comments were made by counsel for MFS, USWC and TRACER. MFS and USWC each asked the Commission to reject certain portions of the agreement and to approve the remainder of the provisions. TRACER opposed approval of the provisions relating to reciprocal compensation.

At the conclusion of the open meeting, the Commission approved all provisions of the Arbitrated Interconnection Agreement as submitted and directed that a written order be prepared.

B. Generic Pricing Proceeding

On October 23, 1996, the Commission entered an order in this and other arbitration dockets declaring that a generic proceeding would be initiated in order to review costing and pricing issues for interconnection, unbundled network elements, transport and termination and resale.[1] The Commission stated that rates adopted in the pending arbitrations would be interim rates,

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[1] Order on Sprint's Petition to Intervene and to Establish Generic Pricing Proceeding (October 23, 1996) ("Generic Pricing Order")

pending the completion of the generic proceeding. Accordingly, the price proposals made in this arbitration have been reviewed with the goal of determining which offers a more reasonable interim rate. The conclusions of the arbitrator with respect to price proposals and supporting information are made in this context and do not necessarily indicate Commission approval or rejection of cost and price proposals for purposes of the generic case.

C. The Eighth Circuit Order and the FCC Rules

The FCC rules[2] implementing the local competition provisions of the Act have been appealed and those rules relating to costing and pricing have been stayed by the United States Court of Appeals for the Eighth Circuit.[3] The provisions of the FCC order and rules not subject to stay are adhered to in the Arbitrator's Report and Decision and this order. Those provisions which are subject to stay do not require compliance pending resolution of the underlying appeal. This Commission is free, therefore, to disregard those specific federal requirements. The stay does not preclude reference, however, to underlying rationale and analysis contained in the federal order for whatever value it may have on its merits.

Having considered the Arbitrator's Report and Decision, the Arbitration Interconnection Agreement and accompanying requests for approval filed by the parties to this arbitration, the entire record herein, and all written and oral comments made to the Washington Utilities and Transportation Commission ("Commission"), the Commission makes the following findings and conclusions:

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[2] *In the Matter of the Implementation of the Local Competition Rules of the Telecommunications Act of 1996*. CC Docket No. 96-98. First Report and Order (August 8, 1996). Appendix B-Final Rules.

[3] Iowa Utilities Board et al. v. FCC. No. 96-3321. Order Granting Stay Pending Judicial Review (8th Cir. Oct. 15, 1996). The order also stays the "MFN" rule.

II. FINDINGS OF FACT

1. The Washington Utilities and Transportation Commission is an agency of the state of Washington, vested by statute with authority to regulate in the public interest the rates, services, facilities and practices of telecommunications companies in the state.

2. The Washington Utilities and Transportation Commission is designated by the Telecommunications Act of 1996 as the agency responsible for arbitrating and approving interconnection agreements between telecommunications carriers, pursuant to Sections 251 and 252 of the Act.

3. This arbitration and approval process was conducted pursuant to and in compliance with the Commission's *Interpretive and Policy Statement Regarding Negotiation, Mediation, Arbitration, and Approval of Agreements Under the Telecommunications Act of 1996*, Docket No. UT 960269, June 27, 1996. The arbitrator's adoption of "last best offer" arbitration in the Fourth Procedural Order was reasonable and consistent with the authority delegated to the arbitrator in the Commission's Order on Arbitration Procedure, June 28, 1996. No party objected to adoption of "last best offer" arbitration in the Fourth Procedural Order.

4. On November 8, 1996, pursuant to the Commission's Order On Arbitration Procedure in this docket, the arbitrator issued an Arbitrator's Report and Decision resolving the disputed issues between the parties to this proceeding, MFS and USWC. *See* Appendix A.

5. On December 9, 1996, the parties submitted a signed Arbitrated Interconnection Agreement to the Commission for approval in part. The Arbitrated Interconnection Agreement properly incorporates the decisions of the arbitrator as to the disputed issues. To the extent the final provisions vary from specific de-

cisions of the arbitrator, pursuant to agreement of the parties, the provisions are treated as negotiated provisions.

6. The Commission has reviewed and analyzed the staff recommendation, the Arbitrator's Report and Decision, the Arbitrated Interconnection Agreement, the filings of the parties, and the record herein, including the oral comments made at the open meeting. The Commission hereby adopts and incorporates by reference the findings and conclusions of the Arbitrator's Report and Decision.

7. At an open meeting on January 6, 1997, the Commission adopted the staff recommendation that the Arbitrated Interconnection Agreement be approved as submitted.

8. USWC made reference in its filings to the "competitive checklist" requirements of Section 271 of the Act.[4] This order makes no findings with regard to the requirements of that section and no determination as to whether USWC is in compliance.

III. CONCLUSIONS OF LAW

1. The arbitrated provisions of the Arbitrated Interconnection Agreement meet the requirements of Section 251 of the Telecommunications Act of 1996, including the regulations prescribed by the Federal Communications Commission pursuant to Section 251 which have not been stayed, and the pricing standards set forth in Section 252(d) of the Act.

2. The negotiated provisions of the Act do not discriminate against a telecommunications carrier not a party to the agreement and are consistent with the public interest, convenience, and necessity.

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[4] 47 USC §§ 271(c)(2)(3).

3. The Arbitrated Interconnection agreement is otherwise consistent with Washington law and with the orders and policies of this Commission.

ORDER

IT IS ORDERED that:

1. The Arbitrated Interconnection Agreement for the State of Washington between MFS Intelenet, Inc., and U S WEST Communications, Inc., is approved.

2. The prices contained in the Agreement are interim prices, subject to replacement by prices adopted in the Commission's generic cost and price proceeding, Docket No. UT 960369 et al.

3. In the event that the parties revise, modify or amend the Agreement approved herein, the revised, modified, or amended Agreement shall be deemed a new negotiated agreement under the Telecommunications Act and shall be submitted to the Commission for approval, pursuant to 47 USC §§ 252(e)(1) and relevant provisions of state law, prior to taking effect.

DATED at Olympia, Washington and effective this 8th day of January 1997.

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION

/s/ Sharon L. Nelson
SHARON L. NELSON
Chairman

/s/ Richard Hemstad
RICHARD HEMSTAD
Commissioner

/s/ William R. Gillis
WILLIAM R. GILLIS
Commissioner

APPENDIX D

[Service Date Nov. 8, 1996]

BEFORE THE WASHINGTON UTILITIES
AND TRANSPORTATION COMMISSION

Docket No. UT-960323

In the Matter of the Petition for Arbitration
of an Interconnection Agreement Between

MFS COMMUNICATIONS COMPANY, INC.
AND US WEST COMMUNICATIONS, INC.

Pursuant to 47 USC Section 252

ARBITRATOR'S REPORT AND DECISION

I. INTRODUCTION

A. Procedural History

On February 8, 1996, MFS Communications Company, Inc. ("MFS") requested negotiations with U S WEST Communications, Inc. ("USWC") for interconnection under the terms of the Telecommunications Act of 1996, Public Law No. 104-104, 101 Stat. 56, *codified at* 47 USC § 151 *et seq.* (1996) (the "1996 Act" or "the Act").

On June 24, 1996, MFS timely filed with the Washington Utilities and Transportation Commission ("Commission") and served on USWC, a petition for arbitration pursuant to 47 USC § 252(b)(1). The matter was designated Docket No. UT-960323. On June 28, 1996, the Commission entered an Order on Arbitration Procedure appointing the undersigned as the ar-

bitrator for this proceeding and establishing certain procedural requirements.

USWC filed its response to the petition. Petitions to intervene were filed by AT&T Communications of the Pacific Northwest, Inc. and Telephone Ratepayers Association for Cost Based and Equitable Rates. The petitions were denied in the Arbitrator's Second and Third Procedural Orders respectively.

"Final offer" arbitration was adopted for this arbitration pursuant to the Arbitrator's Fourth Procedural Order. In preparing the arbitration report in this matter, the arbitrator will select between the parties' last proposals as to each unresolved issue, selecting the proposal which is most consistent with the requirements of state and federal law and Commission policy. The arbitrator will choose either an entire proposal, or choose between parties' proposals on an issue-by-issue basis. In the event that neither proposal is consistent with law or Commission policy, the arbitrator will render a determination in keeping with those requirements.

A hearing was held before the arbitrator on September 18 and 19, 1996, at the offices of the Commission in Olympia, Washington. MFS was represented by Douglas Bonner, attorney at law. USWC was represented by Ed Shaw and Lisa Anderl, attorneys at law. Following the hearing, the parties filed final briefs and final offers on October 2 and 8.

B. Resolved Issues

During the course of the arbitration, a large number of issues were resolved by the parties. Resolution of issues continued after the hearing. The arbitrator has used the Joint Position Statement (JPS)[1] filed by the parties as the definitive statement of

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[1] Joint Position Statement of MFS Intelenet, Inc., and U S WEST Communications, Inc., on Negotiated Terms To Be Included in an Arbitrated Interconnection Agreement, October 2,1996. Appendix A of the agreement is

unresolved issues. This report is limited to consideration of those issues. 47 USC § 252(b)(4)(A), (C). The duty to negotiate in good faith, raised earlier by MFS, was not addressed in the final briefs and will not be treated here as a disputed issue.

USWC made reference in its filings to the "competitive checklist" requirements of section 271 of the Act.[2] This report makes no findings with regard to the requirements of that section and no determination as to whether USWC is in compliance.

C. Generic Pricing Proceeding

On October 23, 1996, the Commission entered an order in this and other arbitration dockets declaring that a generic proceeding would be initiated in order to review costing and pricing issues for interconnection, unbundled network elements, transport and termination and resale.[3] The Commission stated that rates adopted in the pending arbitrations would be interim rates, pending the completion of the generic proceeding. Accordingly, the price proposals made in this arbitration have been reviewed with the goal of determining which offers a more reasonable interim rate. The conclusions of the arbitrator with respect to price proposals and supporting information are made in this context and do not necessarily indicate Commission approval or rejection of cost and price proposals for purposes of the generic case.

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attached. Due to its length the entire agreement is not included. Copies of the entire agreement can be obtained from the Commission's Records Center.

[2] 47 USC § 271(c)(2)(B)

[3] Order on Sprint's Petition to Intervene and to Establish Generic Pricing Proceeding (October 23, 1996) ("Generic Pricing Order")

D. The Eighth Circuit Order and the FCC Rules

As the parties are aware, the FCC rules[4] implementing the local competition provisions of the Act have been appealed and those rules relating to costing and pricing have been stayed by the United States Court of Appeals for the Eighth Circuit.[5] The provisions of the FCC order and rules not subject to stay are adhered to in this report. Those provisions which are subject to stay do not require compliance pending resolution of the underlying appeal. The arbitrator is free, therefore, to disregard those specific federal requirements. The stay does not preclude reference, however, to underlying rationale and analysis contained in the federal order for whatever value it may have on its merits.

II. RESOLUTION OF DISPUTED ISSUES

A. Unbundled Elements

1. Price of the Unbundled Loop

MFS Position

MFS advocates the use of the FCC proxy ceiling for Washington of $13.37 per month as the interim loop rate. MFS argues that the rate is consistent with the Commission's determination of loop cost in the USWC rate case, and with USWC's tariff filing in June 1996 for multi-line business LIS link of $16.83, based on USWC's own TSLRIC.

MFS argues that the USWC TELRIC methodology is flawed because USWC has "loaded" its cost calculation with impermissible costs, including embedded and opportunity costs, in an

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[4] *In the Matter of the Implementation of the Local Competition Rules of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order (August 8, 1996), Appendix B—Final Rules.

[5] *Iowa Utilities Board et al. v. FCC*, No. 96-3321, Order Granting Stay Pending Judicial Review (8th Cir. Oct. 15, 1996). The order also stays the "MFN" rule.

effort to make up for lost revenues and profits expected to result from competition. MFS challenges USWC's use of depreciation lives and cost of money which are not consistent with the most recent rate order.

USWC Position

USWC supports a price of $36.20.[6] USWC asserts that its cost studies comply with the TELRIC methodology prescribed by the FCC Interconnection Order and with the costing and pricing requirements in section 252 of the Act. USWC argues that, under the terms of the FCC order, since it has presented a proper TELRIC cost study to support its loop rate, interim proxy rates are not appropriate. USWC also argues that MFS' failure to devote adequate resources to review of the USWC cost studies does not mean that USWC has failed in its burden of proof.

Contract Provision(s)

JPS, Appendix A, p. 4 (Ancillary Services: Unbundled Loops)

Arbitration Decision

The arbitrator adopts $13.37 as the interim rate for the unbundled loop.

Discussion

This is "final offer" arbitration. The two offers presented differ dramatically. The arbitrator's task is not "split the difference" but to select the offer which most closely complies with the requirements of the federal Act, any applicable FCC requirements, and with this Commission's orders. The rate

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[6] The weighted area average unbundled loop rate originally proposed by USWC in its final offer filing in this proceeding was $38.22. In subsequent filings made by USWC in connection with the cost study, this loop amount was revised to $36.20. *See*, Errata to Washington Testimony and Exhibits of Robert Bowman, Item 7 (submitted at UT-960309 hearing, 10/21-22, 1996).

adopted here, following Commission approval of the interconnection agreement, will remain in effect pending the outcome of the Commission's generic pricing proceeding.[7]

The provisions of the 1996 Act relevant to the determination of the loop pricing issue are contained in section 252(d). Section 252(d)(1) provides that rates shall be just and reasonable and shall be:

> "(i) based on the cost (determined without reference to a rate-of-return or other rate based proceeding) of providing the interconnection or network element (whichever is applicable), and
>
> (ii) nondiscriminatory, and
>
> (iii) may include a reasonable profit."

The Commission has previously had occasion to review loop costs for USWC. In *Washington Utilities and Transportation Commission v. U S WEST Communications, Inc.*, Docket No. UT-950200, Fifteenth Supplemental Order (April 1996) ("USWC rate order"), the Commission found, based on evidence in the record that the approximate cost of USWC's un-

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[7] Generic Pricing Order, at 5. This would be the case unless MFS chose to invoke the provisions of 47 USC § 252(1).

bundled loop was $8.96.[8] These are TSLRIC figures which establish a price floor.[9]

In the rate case, USWC submitted Average Service Incremental Cost (ASIC) presentations in support of its own position as to a proper price for local service. While the precise figures were confidential and not stated in the rate order, the Commission concluded that "the evidence is overwhelming that (residential) local exchange service does cover its [TSLRIC]—even as calculated by the Company in its Average Service Incremental Cost (ASIC) presentation. . . ."[10] Put another way, there was evidence in the record that USWC's own calculation placed the loop cost at something less than $14.00.[11] This provides an additional point of comparison demonstrating the reasonableness of the MFS proposed rate.

When asked in the arbitration hearing about the Commission's conclusions as to loop cost in the rate order, USWC's response has been to acknowledge the findings but to state that

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[8] The context of the finding was an analysis of the incremental cost of local service which includes both the loop and usage. The incremental cost of local service was $4.42, which added to the loop cost yields a total of $13.38. USWC rate order, p. 90, citing Hatfield model estimates presented in the proceeding. *See also*, USWC rate order, p. 132 (Finding of Fact 19), p. 135 (Ordering paragraph 2). Revisions to the Hatfield model have been made subsequent to the rate case. No party has argued that the revisions result in loop costs in the range recommended by USWC.

[9] In the USWC rate order, the Commission found TSLRIC to be an appropriate measure of costs, representing an economic price floor. USWC rate order, p. 82. *See also*, USWC rate order, p. 132 (Finding of Fact 18).

[10] USWC rate order, p. 79. *See also*, p. 82 (discussion of USWC ADSRC cost methodology, including ASIC), p. 86 ("Correcting the USWC local exchange model with the tools and inputs available provides verification for the Hatfield model").

[11] The $14.00 figure includes $10.50 for local residential exchanges service and $3.50 for the subscriber line charge (SLC).

the order is on appeal. *See, e.g.*, Tr. at 330-331 (Bowman), Tr. at pp.413-414, 419-420 (Moran).

As MFS noted at the hearing and in its brief, USWC filed a proposed tariff in June 1996 in Docket No. UT-941464, establishing loop rates for residential and for multi-line business service at $19.24 and $16.83 respectively.[12] These rates were based on TSLRIC. USWC's argument that the methodology for these rates differed from TELRIC is not persuasive. The difference is at least in part due to the company's use of inputs which have been disapproved by the Commission in the rate case. (See discussion below). Again, these proposed rates are an indication that the cost of the unbundled loop, by USWC's own calculations, is less than the proposed rates shown, and that an appropriate price is in the range of the rate proposed by MFS.

The $13.37 rate proposed by MFS is taken from the FCC interconnection order.[13] To calculate proxy rates for unbundled loops, the FCC used the Benchmark Cost Model (BCM) and the Hatfield 2.2 cost model, together with rates for unbundled loops that had been adopted in six states based on studies that were, in general, based on forward-looking economic cost.[14] The FCC combined these elements to create a hybrid cost proxy. First, a scaling factor was applied to the cost estimates of each model. The scaling factor was based on the actual rates computed from unbundled loop elements in the six states listed in the footnote. The cost estimate produced by each model in each state was multiplied by a factor equal to the unweighted average of rates adopted by state commissions in the six states, divided by the

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[12] MFS Exhibit 13. USWC Advice No. 2775T. WN-U34. Section 3. Original Sheet 8.

[13] FCC Interconnection Order. ¶¶ 788-794. and Appendix D. (Setting out the FCC methodology).

[14] The six states' averaged rates are: Colorado. $18.00; Connecticut. $12.95; Florida. $17.28; Illinois. $10.93; Michigan. $10.03; Oregon. $12.45.

unweighted average of the model cost estimates for those states. The hybrid cost proxy is computed as the simple average of the scaled cost estimates for the two models in each of the 48 contiguous states and the District of Columbia. Because the purpose of the proxy is to establish a ceiling, and in order to take into account variations in the data used, an upward adjustment of five percent was made for each state.

Taken together, the unbundled loop cost from the rate case, the USWC ASIC figure from the rate case, the TSLRIC-based rate in the June tariff, and the FCC rationale establish comparators which indicate that the $13.37 figure proposed by MFS is in the range of reasonableness.

USWC's position is based on the premise that its TELRIC study complies with the Act, with FCC requirements, and is otherwise a reliable basis for setting prices. The record, however, indicates some serious flaws in the USWC approach which make the resulting loop prices unacceptable as interim rates.

First, as noted above, the USWC studies entirely disregard the Commission's existing determination as to loop cost.

Second, the USWC cost studies offered to support its final offer position use inputs which are inconsistent with the Commission's recent rate order as to cost of money and depreciation. Tr. at 329-331 (Bowman). For example, the cost of money prescribed in the rate order was 9.37 percent, while that used in the USWC cost study was 11.4 percent. The rate case order states that authorized depreciation rates and the last authorized rate of return are the most appropriate for cost study purposes.[15]

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[15] USWC rate order, at 88.

The rate order also requires the use of objective rather than actual fill factors.[16] USWC uses actual fill in its cost study.[17]

Third, there are indications from the hearing record, that USWC's TELRIC methodology may seek to recover embedded costs or opportunity costs. *See, e.g.*, MFS Ex. 13 (Response to MFS Data Request 01-0023; Tr. at 375, 418-419 (Moran). Such recovery is generally inconsistent with forward-looking cost methodology.

In summary, the MFS recommended loop price is the more reasonable of the two proposals because it is the closest to the loop cost established by the Commission. In addition, the price appears to be more consistent with other cost estimates developed by USWC and with other comparators. The fundamental flaw in USWC's position in this arbitration is failure to propose a rate based on cost inputs found by the Commission to be appropriate.

2. Geographic Deaveraging

MFS Position.

MFS supports geographic deaveraging of rates for the unbundled loop. MFS argues that geographic deaveraging is required by the Act and by the FCC rules, citing 47 CFR § 51.507 (f). MFS offers a deaveraging methodology through the testimony of David Porter, Exhibit 2. MFS proposes the minimum three zones required by the federal rule.

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[16] *Id.*

[17] The arbitrator and arbitration staff asked USWC to perform several additional runs of its cost studies to examine the effect of using different inputs, including inputs consistent with the rate order. None of the additional runs provided in response used exclusively "Commission inputs." The additional runs consistently showed, however, that where Commission inputs were used, the resulting loop rate was lower than that proposed by USWC.

USWC opposes the requirement of geographic deaveraging for unbundled elements such as the loop, at this time. USWC takes the position that deaveraging should not occur until the Commission has adopted deaveraging for retail rates, and cites the Commission's decision against retail deaveraging in the most recent rate case. In the alternative, USWC offers a deaveraging proposal in the event such pricing is required.

Contract Provisions

Appendix A, p. 4, (Unbundled Loops)

Arbitration Decision

The arbitrator adopts the USWC position. USWC need not provide geographically deaveraged rates for the unbundled loop.

Discussion

Geographic deaveraging is not expressly required by the federal Act. The express requirement contained in the FCC rules, 47 CFR § 51.507 (f), is currently stayed by the Eighth Circuit Order. Geographic deaveraging of unbundled loop rates is inconsistent with the Commission's decision against adopting retail rate deaveraging in the most recent USWC rate case.[18]

3. Construction (Implementation) Charges

MFS Position

MFS opposes the imposition of construction or "implementation" charges by USWC. MFS argues that implementation costs that are directly attributable to providng an unbundled network element will be included in TELRIC pricing, citing FCC Interconnection Order, ¶ 691. Implementation costs which are not attributable should not be recovered.

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[18] USWC rate order, pp. 106-107.

USWC Position

USWC argues that it should be entitled to recover "special construction charges" to pay costs that it incurs to unbundle and provision elements requested by new entrants. It takes the position that these charges should be paid in advance. USWC asserts that such charges are consistent with the FCC order, "allowing incumbent LECs to recover the costs of unbundling network elements from requesting carriers." USWC Post-Arb. Brief, p. 19.

Contract Provision(s)

JPS, XXXI.B.4.h, p.78 (Unbundled Access Elements)
JPS, XXIX (Construction Charges)

Arbitration Decision

The arbitrator adopts the MFS position. USWC may not assess separate "construction" charges in addition to the rate for unbundling and provisioning the local loop.

Discussion

The Act contains no express authority for incumbent LECs to charge "construction" charges in addition to the charge for the unbundled loop. Prices for unbundled elements are to be based on cost and may include a reasonable profit. 47 USC § 252(d)(1)(A), (B). USWC's brief does not cite specific authority in the Act or the FCC rules for the separate recovery of construction charges, other than the general requirement that costs be recovered. USWC witness Moran cites ¶ 200 of the FCC order in support of the general proposition that special construction charges are permissible. USWC Ex. 513, p. 172-173. That paragraph does not directly discuss this point or provide express support for the company's position. MFS argues that a forward-looking cost methodology, by definition, incor-

porates all the direct costs of an element, and therefore, already incorporates this type of cost.[19]

Perhaps most problematic is USWC's proposed contract language on this point. Charges would apply when USWC is required to build facilities, or when USWC determines that placement of facilities will be temporary or when facilities are ordered in advance of actual MFS demand for service. JPS, XXIX.A. The actual construction charges are not specified, but will be "developed" by USWC. JPS, XXIX.B. Except where required, construction is only undertaken "at the discretion of USWC, consistent with budgetary responsibilities and consideration for the impact on the general body of customers. JPS, XXIX.C. Before construction would begin, MFS would be provided with a quote, would then have to accept the quote, be sent a bill, and pay the bill. Construction would not commence until receipt of payment. XXIX.D.

While there may be some situations in which construction charges would be appropriate, these requirements are too open-ended. They provide little certainty to MFS about how a request will be treated, how much it will cost, and how fast it will be processed. The vagueness of the provisions creates undue risk that could be used as a barrier or delay to entry. USWC may still assess construction charges where they are provided for by tariff. In addition, construction charges proposals can be further reviewed in the generic pricing proceeding.

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[19] *See, e.g.*, FCC Interconnection Order, ¶ 690. "[A]ll costs associated with the [sic] providing the element shall be included in the incremental cost." "*See also*, ¶ 691 "Costs must be attributed on a cost-causative basis. Costs are causally-related to the network element being provided if the costs are incurred as a direct result of providing the network elements[.]"

4. Loop Installation

MFS Position

In general, MFS believes USWC's proposed loop installation charges are too high. MFS indicates that it is willing to accept the charges for initial installations, however, if the charge for additional lines is significantly lower. These lower "additional line" charges would apply at the same wire center and on the same service order. The presumption is that the proposed rates include dispatch of personnel to offices not regularly staffed, additional dispatch of testing equipment, personnel with testing skills, and special dispatch for coordinated installations. MFS argues that once the personnel and specialized equipment have handled the first line, however, each additional line in the same office and on the same service order should be a simple, low-cost task to perform in the same visit. USWC proposes identical rates for both the initial and all additional lines. The parties' proposed rates are as follows:

Task	MFS	USWC
Additional loop, no testing	$ 20.00	$ 96.30
Additional loop, basic testing	$ 30.00	$153.86
Add. loop, basic testing at designated time	$ 30.00	$206.02

**Above are per service order*

USWC Position

USWC proposes an equal charge for all lines installed.

Contract Provisions

Appendix A, p. 4 (Unbundled Loops)

Arbitration Decision

The arbitrator adopts the MFS position.

Discussion

It is reasonable to conclude that the cost of performing work involving additional lines on the same service order and in the same visit is proportionately lower than that involved with the initial installation. USWC does not adequately explain why the costs of a multi-line installation should, for example, double, or triple based solely on the number of lines involved.

5. Conditioning

MFS Position

MFS opposes additional charges for "conditioning" of loops to provide particular services, especially high bit-rate digital subscriber line (HDSL) service. MFS argues that USWC has not offered any cost justification for this proposal or stated a price level. MFS recommends that USWC's position be rejected without prejudice to reexamination in the consolidated cost proceedings.

USWC Position

As stated in the JPS, XXXI.B.4.a.ii.(a), p. 74:

> To the extent MFS requires an Unbundled Loop to provide ISDN, HDSL, ADSL, or DS1 service, such requirements will be identified on the order for Unbundled Loop Service. Conditioning charges will apply, as required, to condition such loops to ensure the necessary transmission standard.

As noted by MFS, USWC does not appear to propose a price for this service in Appendix A. The issue is not discussed in the post-arbitration brief.

Contract Provision(s)

JPS, XXXI.B.4.a.ii.(a), p. 74. In the JPS filed on October 2 with the arbitrator, however, this provision was not highlighted to indicate disagreement.

Arbitration Decision

The arbitrator adopts the MFS position.

Discussion

USWC has not made a case in support of its position, nor provided a proposed rate. This issue can be addressed in the generic proceeding.

6. "Finished Service" Unbundling

MFS Position

MFS states that it has no particular intention of operating a service exclusively by means of combining unbundled elements purchased from USWC into a "finished service." Notwithstanding this position, MFS opposes USWC's proposed limitation on combination of unbundled elements. MFS argues that the FCC Interconnection Order, at ¶¶ 328-341, specifically rejected such a limitation.

USWC Position

USWC proposes a limitation on combination of unbundled elements by another carrier. The specific contract limitation would provide: "USWC will not combine USWC's Unbundled Loops with USWC's Unbundled Switching Element to provide a finished service to MFS." (Contract reference below). USWC acknowledges that the FCC Interconnection Order interprets the Act to preclude such limitations but argues that combining elements to provide a finished service constitutes "sham unbundling" which is contrary to the intent of the Act. USWC urges the arbitrator and the Commission to disregard the FCC order and to prohibit "finished service" or "sham" unbundling.

Without this limitation, USWC argues, MFS can circumvent the resale provisions of the Act. It could avoid the purchase of a retail service at a wholesale rate (i.e., at the retail price less the avoided cost discount) by obtaining the same service through purchase of the necessary unbundled elements that comprise the

service.[20] USWC is concerned that significant opportunities for price arbitrage could be created.

USWC argues that sham unbundling upsets the balance between resale and unbundling that was established in the Act, suggesting that Congress demonstrated its intent by crafting distinct provisions for resale and unbundling.

Contract Provision(s)

JPS, XXXI.A.2, p. 73

Arbitration Decision

The arbitrator adopts the MFS position. Paragraph XXXI.A.2 of the Joint Position Statement should not be included in the final contract.

Discussion

The 1996 Act states, in pertinent part, that it is:

> "The duty [of the incumbent LEC] to provide, to any requesting telecommunications carrier for the provision of a telecommunications service . . . access to network elements on an unbundled basis[.] An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service." 47 USC § 251 (c)(3)(emphasis added).

The Act, on its face, therefore, appears to expressly permit the combination of elements by a requesting carrier for the purpose of providing a telecommunications service. As MFS notes, the FCC takes this view, finding no basis to conclude from the

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[20] USWC warns that this approach would allow IXCs to avoid paying switched access charges, but notes that the FCC "appears to have removed this concern" in a subsequent Order on Reconsideration. CC Docket No. 96-98, Order on Reconsideration, FCC 96-394 (September 27, 1996).

Act's language "a limitation or requirement in connection with the right of new entrants to obtain access to unbundled elements." *FCC interconnection Order*, ¶328.[21] Consistent with this interpretation, the FCC rules permit the combination of unbundled elements by requesting carriers to provide a telecommunications service. 47 CFR § 51.315(a). This section of the FCC rules is not subject to the Eighth Circuit stay.

While USWC makes a number of practical and policy arguments against permitting combination of elements into a "finished service," USWC's primary statutory argument is that Congress' incorporation of distinct resale and unbundling provisions allow the inference that Congress intended the limitation that USWC seeks. It does not identify any language in Section 251(c)(3) which supports imposition of such a restriction on unbundling.

B. Resale

1. Price

MFS Position

MFS supports adoption of an across the board resale discount of 21 percent on an interim basis. This represents the mid-point of the FCC recommended proxy range of 17-25 percent.[22] MFS did not submit its own avoided cost study.

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[21] *See generally*, FCC Interconnection Order, ¶¶ 329-341. The FCC rejects many of the arguments raised here by USWC, stating, for example:

> We disagree with the premise that no carrier would consider entering local markets under the terms of section 251(c)(4) [resale] if it could use recombined network elements solely to offer the same or similar services that incumbents offer for resale. We believe that sections 251(c)(3) and 251(c)(4) present different opportunities, risks, and costs in connection with entry into local telephone markets[.]

Id., ¶ 331.

[22] FCC Interconnection Order, ¶ 932-933.

USWC Position

USWC urges the adoption of wholesale discounts based on its own avoided cost studies. These studies would result in discounts of between 1 and 8 percent below retail, depending on the service. USWC argues that it has submitted in evidence cost studies which comply with the Act and are consistent with the FCC requirements.

Contract Provision(s)

JPS, Appendix A, p. 5

Arbitration Decision

The arbitrator adopts the MFS proposed rate of 21 percent as a wholesale discount for those services subject to resale under this agreement.

Discussion

Section 252(d)(3), by its terms, adopts a "top-down" approach to the calculation of wholesale discounts. The Act states that wholesale rates shall be determined "on the basis of retail rates charged to subscribers . . . excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier." A significant difficulty with the USWC proposal in this case is that it appears to be a "bottom up" approach. USWC Ex. 509 (Appendix 2 to Bowman Direct). The USWC proposal results in proposed wholesale rates which range from 92 to 99 percent of full retail price.

As noted above, the arbitrator's task under "final offer "arbitration is to choose the position most consistent with the state and federal law and Commission policy. The MFS proposal is the more reasonable of the two presented. The proposed dis-

count of 21 percent is in the middle of the 17-25 percent range developed by the FCC.[23]

The range is based on a formula combining existing state discounts and a study conducted by MCI. MCI's model uses publicly available USOA data. It analyzes three categories of avoided cost: (1) marketing, billing, and collection costs; (2) other costs; and (3) common costs allocated to avoided cost activities. The FCC made several adjustments to the MCI model, primarily to include more accounts in the category of those "not avoided." With the FCC adjustments, the MCI study yielded a range of discounts for the RBOCs and GTE of 18.80 percent to 25.98 percent. State commissions which had reviewed avoided cost studies based on the statutory standard arrived at a range of discounts of 18.74 percent to 20.07 percent. The combined range was from 18.74 percent to 25.98 percent, with a majority of the discounts falling between 18.74 percent and 21.11 percent. The FCC lowered the bottom of the range to take into account additional state data and the fact that avoided costs for smaller incumbent LECs are likely to be less than those of larger incumbents whose data was used in the MCI study. The 21 percent discount proposed by MFS is in the middle of the 17-25 percent range and also lies within the range of a majority of discounts.

2. Services

a. Volume discounts

MFS Position

MFS takes the position that USWC must provide wholesale discounts on retail telecommunications services that already receive a volume or term discount. MFS argues that the language of section 251(c)(4)(A), requiring that "any telecommunications service" provided at retail must be made available for

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[23] FCC Interconnection Order, ¶ 907-934.

resale, contains no exception for volume or term discounted service. MFS also cites the FCC Interconnection Order's conclusions in support of its position.

MFS dismisses the USWC assertion that setting wholesale prices on volume-discounted service results in a double discount, arguing that the Act's price formula for resale is margin neutral. In response to the assertion that resale on volume services will invariably allow competitors to undercut USWC, MFS points out that this argument does not take into account the fact that the new competitor will incur costs of its own in retailing the service.

USWC Position

USWC asks the arbitrator not to require the company to offer further discounts to resellers that are already offered at a volume discount. The company argues that services that are provided at discounts to large customers such as Boeing or the State of Washington are already priced to reflect the fact that USWC avoids many of the usual costs of selling at retail. In addition, discounts are assertedly based primarily on commitments for certain quantities of service over certain terms. These discounts therefore reflect costs avoided because of quantity and term, for example, avoided marketing expenses. In USWC's view, it makes no sense to apply a further discount to these services. USWC argues that the FCC order is less than clear as to the proper treatment of volume discounts, citing ¶¶ 951 and 952.

Contract Provision(s)

JPS, XXX.A, p. 67; Appendix A, p. 5.

Arbitration Decision.

The arbitrator concludes that volume discounted services must be made available for resale.

Discussion

Section 251(c)(4) of the 1996 Act establishes the resale obligations of incumbent local exchange providers, stating:

> (4) Resale: The duty—
>
> (A) to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and
>
> (B) not to prohibit, and not to impose unreasonable and discriminatory conditions or limitations on, the resale of such telecommunications service, except that a State commission may, consistent with regulations prescribed by the [Federal Communications] Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such a service to a different category of subscribers.

Section 251(c)(4)(A) does not contain any exemptions or exceptions to the requirement that "any telecommunications service" must be offered for resale if it is offered at retail to end-users. Section 251(c)(4)(B) expressly precludes a LEC prohibition on resale of such services, and only permits restrictions or limitations which are reasonable and non-discriminatory. The Act's language, therefore, does not support USWC's position. As a practical matter, creating such an exemption would permit incumbent LECs to avoid the resale requirement altogether by switching all customers to some form of discounted or promotional service plan.

The FCC order is clear on volume discounted services. The FCC order states:

> We find unconvincing the arguments that the offerings under section 251(c)(4) should not apply to volume-based discounts. The 1996 Act on its face does not exclude such offerings from the wholesale obligation. If a service is

> sold to end-users it is a retail service, even if it is priced as a volume-based discount off the price of another retail service. The avoidable costs for a service with volume-based discounts, however, may be different than without volume discounts.

FCC Interconnection Order, ¶ 951. The FCC rules on resale restrictions do not incorporate an exemption for volume discounts. 47 CFR § 51.613. This provision is not subject to the Eighth Circuit stay. The FCC does go on to note that, while there may be reasonable restrictions on promotions and discounts, *FCC Interconnection Order* ¶ 952, restrictions on resale of volume discounts will "frequently produce anticompetitive results [and] should be considered presumptively unreasonable." *Id.*, ¶ 953.

The FCC order also notes, however, that in calculating the proper wholesale rate, incumbent LECs may prove that their avoided costs differ when selling large volumes. In this arbitration, USWC argues that its volume discounts "reflect costs that are avoided because of the quantities and the term of the contract." USWC Post-Arbitration Brief, p. 11. MFS acknowledges that this may be the case and that the avoided cost discount for volume discounted services could be "low" or "zero" based on an appropriate cost study. Tr. 135-136 (Artman). While this is not a basis for excluding volume discounts entirely from the resale requirement, it can be taken into account in establishing the proper wholesale rate. In this case, the record establishes that USWC avoids retail costs when selling at volume. The record does not enable the arbitrator to determine, however, the extent of avoided costs which remain after USWC applies a discount.

As noted above, the arbitrator does not adopt the USWC wholesale discounts based on its avoided cost study. The Commission has referred resale pricing to a generic proceeding. Any resale rate adopted in this proceeding, therefore, will be an in-

terim rate. In order to arrive at rate for volume discounted services on an interim basis, therefore, the arbitrator will treat the volume discount as a reasonable approximation of the costs avoided by the volume sale. USWC may, therefore, apply the existing volume discount as a "credit." MFS will receive either the volume discounted rate or 21 percent (off the original retail rate), whichever is the larger discount.

b. "Below-cost" residential service

While the parties argued this issue in their final briefs, the matter no longer appears to be in dispute. Appendix A, p. 5. MFS states in the Appendix that USWC shall make its "residence exchange tariff" available for resale "without additional 'Wholesale' discount." USWC lists the "Residence Exchange Tariff" as available for resale at 100 percent of the retail rate. This issue will be treated as a negotiated term of the agreement.

c. "Grandfathered" and other services.

MFS Position

MFS' general position is that all telecommunications service should be offered for resale, except enhanced services. Appendix A, p. 5 (See discussion under a. above). It does not require, however, that wholesale discounts be offered for three services: (1) switched access tariff, (2) special access tariff, and (3) residence exchange tariff. All other services are to be made available for resale at the avoided cost discount, including all contract arrangements, including "off-tariff" arrangements.

USWC Position

USWC argues that withdrawn services, such as Centrex, are not subject to resale, except as to "grandfathered" customers. In addition, USWC's position is that enhanced services (including voice mail) and deregulated services should not be made available for resale.

Contract Provision(s)

JPS, Appendix A, p. 5

Arbitration Decision

The arbitrator adopts the MFS position.

Discussion

A number of points are not in dispute. The parties have agreed that switched access, special access,[24] and residential exchange tariffs are available for resale at a zero discount. USWC will not offer enhanced services for resale. All services listed in the USWC table in Appendix A, p. 5, are being made available for resale. The discount rate, where not agreed to by the parties, has been addressed and resolved above.

The USWC brief argued that discontinued services such as Centrex should not be subject to resale, except to grandfathered customers, as required by the FCC order. *FCC Interconnection Order*, ¶ 968. Appendix A lists Centrex Plus as available for resale. In the event the withdrawal of the service is approved by the Commission, MFS may resell the service to grandfathered customers.

All USWC telecommunications services that are provided at retail to non-carrier subscribers must be offered for resale. 47 USC § 251 (c)(4)(A). The only exception for purposes of the arbitration is enhanced services, which the parties have negotiated. USWC seeks to except "deregulated" services. The Act contains no exemption or exception for such services and the

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[24] The USWC brief states that private line service and special access are the same service, as they are sold from the special access tariff. For purposes of this report they will be treated as incorporated in the "special access tariff" agreement negotiated by the parties. In any event, exchange access services generally are not subject to the resale provisions of the Act. *FCC Interconnection Order*, ¶¶ 873-875.

exclusion of these services from resale is therefore not appropriate.

3. Limits to "Intended or Disclosed Use"

MFS Position

MFS opposes the proposed contract language from USWC as an unreasonable condition or limitation on the use of resold service by the reseller's end-user. MFS relies on the Act and on the FCC Interconnection Order's conclusion that restrictions on resale are presumptively unreasonable.

USWC Position

USWC proposes contract language that would state that "Basic Exchange Telecommunications Service may be resold only for its intended or disclosed use." The company apparently justifies this position on the basis of the language in section 251 (c)(4)(B) which precludes resale across categories of customers.

Contract Provision(s)

JPS, XXX.B.1.c, p. 67

Arbitration Decision

The arbitrator adopts the MFS position. The proposed contract language should not be included in the agreement.

Discussion

Section 251(c)(4)(B) prohibits unreasonable limitations or conditions on resale. As noted above, the FCC has concluded generally that "resale restrictions are presumptively unreasonable." *FCC Interconnection Order*, ¶ 939. Incumbent LECs can rebut the presumption by showing that the restriction is narrowly tailored. *Id.* The FCC identified only two restrictions it found reasonable: (1) restrictions on resale of short-term promotions; and (2) restrictions on cross-class selling of residential and Lifeline service. Id., ¶ 950, 962. *See also*, 47 CFR § 51.613 (not subject to stay).

The agreed contract language already states that "USWC Basic Exchange Telecommunications Service may be resold only to the same class of customers" to which it is sold by USWC. JPS, XXX.B.1, p. 67. The agreed contract language cites as an example that [r]esidential service may not be resold to business customers . . ." JPS, XXX.B.1.a), p.67. These provisions adequately address the concern raised by USWC and are consistent with the federal Act and the FCC order.

4. Construction Charges

MFS Position

MFS' position is that construction charges are appropriate only in those circumstances where such charges would apply if the end-user ordered the same service directly from USWC. MFS argues that this is consistent with the Act, since, if a retail customer would be required to pay a construction charge to obtain service, then that construction charge is part of the retail rate and would also be included in the wholesale rate. MFS observes that the construction charge in principle would be subject to wholesale discounting, but is unlikely to have significant avoidable costs.

MFS argues that the USWC position is not supported by the language of the Act or the FCC rules. MFS also suggests that it may constitute discrimination if USWC would extend facilities to an end-user on request without a construction charge, but not to a reseller who would serve that same end-user.

USWC Position

USWC takes the position that it must be permitted to charge resellers for construction of new facilities which are required to serve that reseller. Such charges should be paid in full before construction. USWC acknowledges that, in most cases, resale requests will be received in areas where facilities are available. Where this is not the case, however, USWC seeks assurance that it will not be left "holding the bag." This could occur if

MFS were to request construction of facilities by USWC and later abandon the USWC facility after constructing its own. Unless MFS has paid in advance, USWC argues it would have no way to recover these construction costs. In support of its position, USWC cites the FCC Interconnection Order, ¶¶ 200 and 672. USWC Ex. 513 (Moran), at 57-59.

Contract Provision(s).

JPS, XXIX, p. 66 (Construction Charges)

Arbitration Decision

The arbitrator adopts the MFS position.

Discussion

The federal Act contains no specific authorization for recovery of construction charges. The provisions of the FCC order cited by USWC witness Moran do not support the company position. Paragraph 200 is a discussion of the relationship of cost and "technical feasibility" under the interconnection and unbundling provisions of the Act, sections 251(c)(2) and 251 (c)(3). Paragraph 672 is a general overview statement by the FCC indicating it intends to adopt forward-looking cost principles to price interconnection and unbundled elements. In the event that a construction charge would be included in a retail rate to an end-user under tariff, MFS indicates that it is willing to pay that amount. The parties may include contract language to that effect at their option. (See discussion of construction charges in Section II.A.3 above).

5. Non-recurring Charges

MFS Position

MFS does not oppose the concept of customer transfer charges, but believes that they should be assessed on a per-customer rather than a per-line basis.

MFS argues that a transfer for resale purposes represents only a change of records rather than serving arrangements and should be no more difficult than a change of billing address. MFS sees no justification for imposing a transfer charge for a five-line customer that is five times that imposed for a single-line customer.

USWC Position

USWC proposes a customer transfer charge of approximately $55.00 on a per-line basis for business, residence, and ISDN customers. The charge is based on USWC TELRIC plus common costs. USWC Ex. 516 (Moran, Ex. C, p.2).

Contract Provision(s)

JPS, Appendix A, p. 6 (Resale Nonrecurring Charges, Customer Transfer Charge)

Arbitration Decision

The arbitrator adopts the MFS position.

Discussion

While USWC's proposed rate is based on its TELRIC studies, the company does not explain why it is more reasonable to impose a per-line as opposed to a per-customer charge. Based on the record in the arbitration, the MFS position appears more reasonable as an interim rate.

6. Joint Marketing

Based on the discussion in the MFS post-arbitration brief, it does not appear that any joint marketing issues remain for resolution.

7. Billing Cycle

MFS Position

MFS requests a 90 day time certain for billing all amounts due to USWC for resold service. MFS believes this is more rea-

sonable than USWC's proposal to use existing tariffs because it fixes a time certain for billing within the arbitrated agreement itself, rather than relying on external sources which may change over the life of the agreement.

USWC Position

USWC proposes language that would require that billing for resold services be in accordance with the terms and conditions specified in the USWC tariff.

Contract Provision(s)

JPS, XXX.H.7, p. 72 (Resale: Payment)

Arbitration Decision

The arbitrator adopts the MFS position.

Discussion

MFS concern that this matter be included within the terms of the agreement is consistent with the "interconnection by agreement" approach of the federal Act.

C. Reciprocal Compensation

1. Call Termination—Tandem or End Office

MFS Position

MFS requests tandem rate treatment for calls terminated on its network pursuant to the FCC Interconnection Order,¶ 1090, and FCC rule, 47 CFR § 51.711(a)(3). MFS argues that the non-incumbent carrier incurs additional costs in serving customers larger than a single wire center.

MFS states that it will accept the USWC proposed rates for termination if it receives tandem rate treatment for its own switch. if tandem rate treatment is not received for traffic terminated to MFS, MFS would propose reciprocal per minute rates of $0.004 for end office termination and $0.006 for tandem termination.

MFS argues that it need only demonstrate that its switch serve a comparable geographic area to that of USWC. It relies on its hearing testimony regarding the scope of its facilities.

The MFS switch is located in Kirkland, Washington. It is currently collocated in six USWC central offices in the Seattle area. MFS has a fiber ring that includes Lake Washington and connects those six offices. Tr. 124 (Artman). MFS stated at the hearing that its switch is capable of performing tandem functions. Tr. 96 (Artman). MFS expects that the area served by its switch will include metropolitan Seattle and Tacoma, and will include some GTE service areas. Purchase of unbundled links and transport will enable MFS to serve other areas as well.

MFS argues that if it services customers in central and eastern Washington it will have to absorb the cost of construction, leasing, or purchasing unbundled elements to provide facilities.

USWC Position

In resolving this issue, USWC states that the arbitrator must consider whether the MFS switch performs a similar function to the USWC tandem switch and whether it serves a similar geographic area. It is USWC's position that the respective switches are not comparable in either respect. USWC witness Moran stated that the MFS switch might serve five or ten thousand customers located along a concentrated route that may be 50 or 100 miles long, perhaps 60 square miles. By contrast, the USWC tandem network in the comparable area serves 1600 square miles. USWC argues that the sporadic service within an area offered by MFS is not comparable. Moran contrasted the function of a tandem switch, which connects trunks to trunks, with an end-office switch which connects lines to lines, lines to trunks, and performs other functions. USWC argues that the MFS switch is not connected to any trunks and cannot offer USWC this comparable switching functionality. USWC further objects that the effect of the MFS proposal is to preclude it from

having an option of avoiding tandem charges by terminating at an end office.

Contract Provision(s)

JPS, Appendix A, p.1 (Local Call Termination)

Arbitration Decision

The arbitrator adopts the USWC proposed rates for end-office termination. The arbitrator adopts the MFS proposal for tandem treatment for its switch.

Discussion

The parties are reasonably close on the issue of call termination and on the proposed rates. Under 47 USC § 252(d)(2), terms and conditions for reciprocal compensation are not to be construed as just and reasonable unless they provide for the mutual and reciprocal recovery of costs of transport and termination. Such costs must be based on a reasonable approximation of the additional costs of terminating such calls. State commissions may not engage in rate regulation proceedings to determine the costs of transport and termination with particularity and may not require carriers to maintain records of the cost of the calls.

MFS has established that its switch is reasonably comparable in geographical scope to a USWC tandem. While there questions about the functional comparability of the MFS switch to a tandem switch, particularly as to trunk to trunk capability, the record supports a conclusion that the MFS switch, like a tandem, performs the function of aggregating traffic from widespread remote locations with low traffic volumes. The record also indicates that, in order to terminate USWC calls on its network, MFS will incur additional costs over costs that would be incurred by simple end-office switch termination. While the MFS position is based on approximations, the Act expressly provides that a "reasonable approximation" of costs is to be the

basis of determinations, and that costs may not be determined with "particularity."

2. Enhanced Service Provider (ESP) Call Termination

MFS Position.

MFS opposes establishing any unique treatment of ESPs in this agreement. MFS argues that there is no basis in the Act or in other applicable law for such a differentiation and that such traffic has not previously been separated or segregated. To date, the FCC has treated ESP traffic like other local traffic. MFS argues that this is appropriate because the traffic is typically local in nature. In MFS' view, USWC is attempting to prejudge issues which will be addressed by the FCC in its access charge reform proceeding.

USWC Position

USWC seeks to exempt any traffic originated or terminated by enhanced service providers from the reciprocal compensation arrangements of the agreement. This position is based on a recognition of the unique status of this traffic, which is currently exempt from paying Part 69 access charges. USWC expects the FCC to address this exemption in its forthcoming access charge reform proceeding. Until that time, USWC believes it is appropriate to exclude ESPs from coverage under the reciprocal compensation provisions.

Contract Provision(s)

JPS, V.D.1.e, p. 12 (Reciprocal Traffic Exchange)

Arbitration Decision

The arbitrator adopts the MFS position.

Discussion

It is premature to change the treatment of ESPs at this time.

3. Late Payment Charges

MFS Position

MFS has proposed language for the contract which would assess late payment charges in the event switched access usage data is not submitted in a timely fashion and if, as a result, the receiving party is delayed in billing interexchange carriers. The proposal also provides liability if the data is not submitted within 90 days. The liability provision states:

> In the event the recording party [e.g. USWC] has not submitted such data in the proper format by the 90th day following the original due date, billings for the traffic associated with such traffic will be deemed "lost" and the recording party shall be liable to the receiving party for the amount of the lost billings. JPS, V.K.7, p. 17.

MFS argues that the provision is commercially reasonable and designed to allow parties some confidence in dealing with IXCs or other third parties, that it will protect parties against loss, and that it will ensure compliance with the time frames provided in the agreement.

USWC Position

USWC opposes the MFS provision on the ground that such an arrangement is not currently in place with any other co-carrier (independent LEC) with whom USWC interconnects. USWC argues that the provision is entirely too severe and may cause substantial revenue loss disproportionate to any revenue loss that might occur.

Contract Provision(s)

JPS, V.K.7, p. 17 (Reciprocal Traffic Exchange: Billing Arrangements)

Arbitration Decision

The arbitrator adopts the USWC position.

Discussion

While some provision for encouraging timely billing may be appropriate, the "lost billings" provision is unreasonable.

D. Special Construction

The issue of construction charges has been addressed under specific sections above.

E. Interim Number Portability

1. Switched Access Charges

MFS Position

MFS proposes that, for all intra-LATA TOLL and inter-LATA minutes delivered over Interim Number Portability (INP), USWC will pay, in lieu of reciprocal compensation, all terminating switched access elements otherwise due the terminating office provider, including: end-office switching, transport interconnection charge, the carrier common line charge (CCLC), and an appropriate portion of tandem switched transport.

USWC Position

USWC proposes that for all intra-LATA TOLL and inter-LATA minutes delivered over INP, USWC will pay, in addition to reciprocal compensation, the applicable CCLC for each minute.

Contract Provision(s)

JPS, VIII.B.h, pp. 37-38 (Cost Recovery)

Arbitration Decision

The arbitrator adopts neither position.

Discussion

The FCC Number Portability order[25] addresses the appropriate treatment of terminating access charges in the interim number portability context. While the FCC generally approves the model of meet-point billing arrangements between neighboring incumbent LECs, it requires incumbent LECs and competitors to share in the access revenues received for a ported call.

The FCC order states:

> "[W]e direct forwarding carriers and terminating carriers to assess on IXCs charges for terminating access through meet-point billing arrangements . . . it is up to the carriers whether they each issue a bill for access to one ported call, or whether one of them issues a bill to the IXCs covering all of the transferred calls and shares the correct portion of the revenues with the other carriers involved." *Id.*

Neither proposal is sufficiently consistent with the FCC order. USWC and MFS should draft a provision incorporating the foregoing requirements. Since the carriers have been unable to agree, the arbitrator determines that the contract should provide that each carrier issue a bill to the IXC for its portion of the access charges, based upon the functions and facilities provided by the carrier for call forwarding or termination. The parties' agreement should take into account the fact that USWC receives compensation for INP costs by means of the Remote Call Forwarding charges discussed below.

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[25] *In the Matter of Telephone Number Portability*, First Report and Order, CC Docket No. 95-116, FCC 96-286 (released July 2, 1996) (FCC Number Portability Order) ¶ 140.

2. Cost Recovery

MFS Position

MFS proposes that the two parties agree to assign between themselves, on an interim basis, interim number portability costs on the basis of active local numbers, recognizing that such assignment necessarily excludes recovery from other industry participants. USWC and MFS would be left free to advocate the assignment of costs to other industry participants as part of the appropriate industry-wide cost recovery method.

USWC Position

USWC takes the position that all of the INP costs identified in the agreement (JPS) should be the responsibility of the "INP Requestor" (i.e. MFS).

Contract Provision(s)

JPS, VIII.B.f, pp. 36-37 (Cost Recovery)

Arbitration Decision

The arbitrator adopts the MFS position.

Discussion

Section 251(e)(2) provides that "[t]he cost of establishing telecommunications . . . number portability shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the [FCC]." The FCC Number Portability Order identified a number of approaches for competitively neutral cost recovery, including the apportionment of costs based on number of active telephone numbers.[26] The MFS proposal is, therefore, consistent with the FCC order and with the 1996 Act. The USWC position, however, finds no support in the statute or the FCC order. The FCC order specifically states that a cost recov-

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[26] FCC Number Portability Order, ¶¶ 130, 136.

ery mechanism which places all the costs on the new entrant would not be competitively neutral.[27]

F. Collocation

Parties Positions

a. Quote preparation fee

MFS proposes a nonrecurring quote preparation fee of $1,500.00.

USWC proposes $2,437.30

Neither party discusses the issue in its final briefs.

b. Entrance facility

MFS proposes a recurring fee of $2.07 and a nonrecurring fee of $1,307.45 to be assessed on a per cable basis. USWC proposes the same charges, but would assess them for 2 fibers, rather than on a per cable basis. MFS agrees that the price is appropriate per cable but disputes the limitation as to number of fibers within a cable to be routed to a given collocation space.

c. Installation charges for EICT

MFS objects to the nonrecurring installation charges for cross-connection to collocation equipment. It proposes charges ranging from $100.00 to $300.00, which its says are "reasonable." It also proposes that these charges not apply to unbundled loops where a separate unbundled loop NRC applies.

USWC proposes charges ranging from $339.61 to $433.23. Charges would apply to whether or not a separate unbundled loop NRC applies.

Contract Provision(s)

JPS, Appendix A, p. 3 (Physical and Virtual Collocation)

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[27] *Id.*, ¶ 134, 138.

Arbitration Decision

a. Quote preparation. The arbitrator adopts the USWC position.
b. Entrance facilities. The arbitrator adopts the MFS position.
c. EICT charges. The arbitrator adopts the USWC position as to rates and the MFS position as to applicability of the charge.

Discussion

a. Quote preparation

MFS did not provide a rationale for its proposed figure.

b. Entrance facilities.

The amount of the charge is not in dispute. USWC did not explain, however, the basis for assessing the charge on the basis of number of fibers rather than a per cable basis.

c. EICT

As to rates, MFS provides no support for its recommended charges. MFS makes a reasonable argument, however, that the installation NRC should not apply when another NRC is already chargeable for the same unbundled loop installation.

G. Interconnection Architecture

MFS Position

MFS has requested that interconnection occur initially at the tandem switch. It objects to any requirement that it interconnect initially at the end-office level. MFS acknowledges that end-office interconnection will become appropriate as traffic volumes increase. MFS therefore seeks language in the agreement's definition of "Routing Point" as follows: "The Rating Point/Routing Point need not be the same as the rate center point, nor must it be located within the rate center area, but must be in the same LATA as the NPA/NXX."

USWC Position

USWC opposes inclusion of this language on the ground that it could have the effect of requiring USWC to provide substantial transport on a local call between USWC and MFS customers located in close proximity. USWC believes it is appropriate to establish "points of interface" (POIs) for local traffic within the associated USWC local calling area.

Contract Provision(s)

JPS, III.RR, p. 7 (Definitions)

Arbitration Decision

The arbitrator adopts the MFS position.

Discussion

The 1996 Act provides that incumbent LECs have the duty to provide for interconnection "at any technically feasible point within the carrier's network. 47 USC § 251(c)(2)(B). The FCC Interconnection Order interprets this provision as giving "competing carriers the right to deliver traffic terminating on an incumbent LEC's network at any technically feasible point on that network, rather than obligating such carriers to transport traffic to less convenient or efficient interconnection points." *FCC Interconnection Order*, ¶ 209. The FCC went on to identify a minimum list of technically feasible interconnection points, including the tandem switch. *Id.*, ¶ 210. The burden of proof is on the incumbent LEC to demonstrate that interconnection at a particular point is not technically feasible. *Id.*, ¶ 211. These requirements were incorporated in the FCC rules. 47 CFR § 51.305(a)(2) and (e). USWC does not argue that the interconnection sought by MFS is not technically feasible.

III. IMPLEMENTATION SCHEDULE

Pursuant to section 252(c)(3), the arbitrator is to "provide a schedule for implementation of the terms and conditions by the parties to the agreement." In this case, the arbitrator adopts the

implementation schedule set forth in the Joint Position Statement, Section XXXIII, p. 82.

IV. CONCLUSION

The foregoing resolution of the disputed issues in this matter meets the requirements of 47 USC § 252(c).

The parties are directed to submit an agreement consistent with the terms of this report to the Commission for approval within 30 days, pursuant to the following requirements of the Interpretive and Policy Statement:[28]

Filing and Service of Agreements for Approval

1. An interconnection agreement shall be submitted to the Commission for approval under Section 252(e) within 30 days after the issuance of the Arbitrators's Report, in the case of arbitrated agreements, or, in the case of negotiated agreements, within 30 days after the execution of the agreement. The 30 day deadline may be extended by the Commission for good cause. The Commission does not interpret the 9 month time line for arbitration under Section 252(b)(4)(C) as including the approval process.

2. Requests for approval shall be filed with the Secretary of the Commission in the manner provided for in WAC 480-09-120. In addition, the request for approval shall be served on all parties who have requested service (List available from the Commission Records Center. See Section II.A.2 of the Interpretive and Policy Statement) by delivery on the day of filing. The service rules of the Commission set forth in WAC 480-09-120 and 420 apply except as modified in this interpretive order or by

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[28] *In the Matter of Implementation of Certain Provisions of the Telecommunications Act of 1996*, Docket No. UT-960269, Interpretive and Policy Statement Regarding Negotiation, Mediation, Arbitration, and Approval of Agreements Under the Telecommunications Act of 1996 (June 27, 1996) ("Interpretive and Policy Statement").

the Commission or arbitrator. Unless filed jointly by all parties, the request for approval and any accompanying materials should be served on the other signatories by delivery on the day of filing.

3. A request for approval shall include the documentation set out in this paragraph. The materials can be filed jointly or separately by the parties to the agreement, but should all be filed by the 30 day deadline set out in paragraph 1 above.

Negotiated Agreements

a. A "request for approval" in the form of a brief or memorandum summarizing the main provisions of the agreement, setting forth the party's position as to whether the agreement should be adopted or modified, including a statement as to why the agreement does not discriminate against non-party carriers, is consistent with the public interest, convenience, and necessity, and is consistent with applicable state law requirements, including Commission interconnection orders.

b. A complete copy of the signed agreement, including any attachments or appendices.

c. A proposed form of order containing findings and conclusions.

Arbitrated Agreements

a. A "request for approval" in the form of a brief or memorandum summarizing the main provisions of the agreement, setting forth the party's position as to whether the agreement should be adopted or modified; and containing a separate explanation of the manner in which the agreement meets each of the applicable specific requirements of Sections 251 and 252, including the FCC regulations thereunder, and applicable state requirements, including Commission interconnection orders. The "request for approval" brief may reference or incorporate previously filed briefs or memoranda. Copies should be at-

tached to the extent necessary for the convenience of the Commission.

b. A complete copy of the signed agreement, including any attachments or appendices.

c. Complete and specific information to enable the Commission to make the determinations required by Section 252(d) regarding pricing standards, including but not limited to supporting information for (1) the cost basis for rates for interconnection and network elements and the profit component of the proposed rate. (2) transport and termination charges; and (3) wholesale prices.

d. A proposed form of order containing findings and conclusions.

Combination Agreements (Arbitrated/Negotiated)

a. Any agreement containing both arbitrated and negotiated provisions shall include the foregoing materials as appropriate, depending on whether a provision is negotiated or arbitrated. The memorandum should clearly identify which sections were negotiated and which arbitrated.

b. A proposed form of order is required, as above.

4. Any filing not containing the required materials will be rejected and must be refiled when complete. The statutory time lines will be deemed not to begin until a request has been properly filed.

Confidentiality

1. Requests for approval and accompanying documentation are subject to the Washington public disclosure law, including the availability of protective orders. The Commission interprets 47 USC § 252(h) to require that the entire agreement approved by the Commission must be made available for public inspection and copying. For this reason, the Commission will ordinar-

ily expect that proposed agreements submitted with a request for approval will not be entitled to confidential treatment.

2. If a party or parties wishes protection for appendices or other materials accompanying a request for approval, the party shall obtain a resolution of the confidentiality issues, including a request for a protective order and the necessary signatures (Exhibits A or B to standard protective order) prior to filing the request for approval itseif with the Commission.

Approval Procedure

1. The request will be assigned to the Commission Staff for review and presentation of a recommendation at the Commission public meeting. The Commission does not interpret the approval process as an adjudicative proceeding under the Washington Administrative Procedure Act. Staff who participated in the mediation process for the agreement will not be assigned to review the agreement.

2. Any person wishing to comment on the request for approval may do so by filing written comments with the Commission no later than 10 days after date of request for approval. Comments shall be served on all parties to the agreement under review. Parties to the agreement file written responses to comments within 7 days of service.

3. The request for approval will be considered at a public meeting of the Commission. Any person may appear at the public meeting to comment on the request for approval. The Commission may in its discretion set the matter for consideration at a special public meeting.

4. The Commission will enter an order, containing findings and conclusions, approving or rejecting the interconnection agreement within 30 days of request for approval in the case of arbitrated agreements, or within 90 days in the case of negotiated agreements. Agreements containing both arbitrated and

negotiated provisions will be treated as arbitrated agreements subject to the 30 day approval deadline specified in the Act.

Fees and Costs

1. Each party shall be responsible for bearing its own fees and costs. Each party shall pay any fees imposed by Commission rule or statute.

DATED at Olympia, Washington and effective this 8th day of November 1996.

WASHINGTON UTILITIES AND
TRANSPORTATION
COMMISSION

/s/ Simon J. Ffitch
SIMON J. FFITCH
Arbitrator

APPENDIX E

[Filed Jan. 12, 2000]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 98-35146
D.C. No. CV-97-00222-WLD

US WEST COMMUNICATIONS,
Plaintiff-Appellant,

v.

MFS INTELENET, INC; ANNE LEVINSON, Chairperson; RICHARD HEMSTAD, Commissioner; WILLIAM P. GILLIS, Commissioner, in their official capacities as Commissioners of the Washington Utilities and Transportation Commission; and WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION,
Defendants-Appellees.

FEDERAL COMMUNICATIONS COMMISSION,
Amicus curiae.

ORDER

Before: BROWNING and HAWKINS, Circuit Judges, and SHADUR[1], District Judge.

Appellant U S West's motion for leave to file reply in support of petition for rehearing en banc is granted. The brief received December 15, 1999, is ordered filed.

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[1] The Honorable Milton I. Shadur, Senior United States District Judge, Northern District of Illinois, sitting by designation.

The panel as constituted above has voted to deny the petition for rehearing. Judges Browning and Hawkins voted to deny the petition for rehearing en banc, and Judge Shadur so recommended.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are denied.

APPENDIX F

STATUTORY PROVISIONS

47 U.S.C. § 251. INTERCONNECTION.

(a) GENERAL DUTY OF TELECOMMUNICATIONS CARRIERS.—Each telecommunications carrier has the duty—

(1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers; and

(2) not to install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to section 255 or 256.

(b) OBLIGATIONS OF ALL LOCAL EXCHANGE CARRIERS.—Each local exchange carrier has the following duties:

(1) RESALE.—The duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services.

(2) NUMBER PORTABILITY.—The duty to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission.

(3) DIALING PARITY.—The duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service, and the duty to permit all such providers to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays.

(4) ACCESS TO RIGHTS-OF-WAY.—The duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224.

(5) RECIPROCAL COMPENSATION.—The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.

(c) ADDITIONAL OBLIGATION OF INCUMBENT LOCAL EXCHANGE CARRIERS.—In addition to the duties contained in subsection (b), each incumbent local exchange carrier has the following duties:

(1) DUTY TO NEGOTIATE.—The duty to negotiate in good faith in accordance with section 252 the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) and this subsection. The requesting telecommunications carrier also has the duty to negotiate in good faith the terms and conditions of such agreements.

(2) INTERCONNECTION.—The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network—

(A) for the transmission and routing of telephone exchange service and exchange access;

(B) at any technically feasible point within the carrier's network;

(C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and

(D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252.

(3) UNBUNDLED ACCESS.—The duty to provide, to any requesting telecommunications carrier for the provision of

a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

(4) RESALE.—The duty—

(A) to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and

(B) not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service, except that a State commission may, consistent with regulations prescribed by the Commission under this section, Prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such to a different category of subscribers.

(5) NOTICE OF CHANGES.—The duty to provide reasonable public notice of changes in the information necessary for the transmission and routing of services using that local exchange carrier's facilities or networks, as well as of any other changes that would affect the interoperability of those facilities and networks.

(6) COLLOCATION.—The duty to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment nec-

essary for interconnection or access to unbundled network elements at the premises of the local exchange carrier, except that the carrier may provide for virtual collocation if the local exchange carrier demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations.

(d) IMPLEMENTATION.—

(1) IN GENERAL.—Within 6 months after the date of enactment of the Telecommunications Act of 1996, the Commission shall complete all actions necessary to establish regulations to implement the requirements of this section.

(2) ACCESS STANDARDS.—In determining what network elements should be made available for purposes of subsection (c)(3), the Commission shall consider, at a minimum, whether—

(A) access to such network elements as are proprietary in nature is necessary; and

(B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.

(3) PRESERVATION OF STATE ACCESS REGULATIONS.—In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that—

(A) establishes access and interconnection obligations of local exchange carriers;

(B) is consistent with the requirements of this section; and

(C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

(e) NUMBERING ADMINISTRATION.—

(1) COMMISSION AUTHORITY AND JURISDICTION.—The Commission shall create or designate one or more impartial entities to administer telecommunications numbering and to make such numbers available on an equitable basis. The Commission shall have exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States. Nothing in this paragraph shall preclude the Commission from delegating to State commissions or other entities all or any portion of such jurisdiction.

(2) COSTS.—The cost of establishing telecommunications numbering administration arrangements and number portability shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission.

(f) EXEMPTIONS, SUSPENSIONS, AND MODIFICATIONS.—

(1) EXEMPTION FOR CERTAIN RURAL TELEPHONE COMPANIES—

(A) EXEMPTION.—Subsection (c) of this section shall not apply to a rural telephone company until (i) such company has received a bona fide request for interconnection, services, or network elements, and (ii) the State commission determines (under subparagraph (B)) that such request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 (other than subsections (b)(7) and (c)(1)(D) thereof).

(B) STATE TERMINATION OF EXEMPTION AND IMPLEMENTATION SCHEDULE.—The party making a

bona fide request of a rural telephone company for interconnection, services, or network elements shall submit a notice of its request to the State commission. The State commission shall conduct an inquiry for the purpose of determining whether to terminate the exemption under subparagraph (A). Within 120 days after the State commission receives notice of the request, the State commission shall terminate the exemption if the request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 (other than subsections (b)(7) and (c)(1)(D) thereof). Upon termination of the exemption, a State commission shall establish an implementation schedule for compliance with the request that is consistent in time and manner with Commission regulations.

(C) LIMITATION ON EXEMPTION.—The exemption provided by this paragraph shall not apply with respect to a request under subsection (c) from a cable operator providing video programming, and seeking to provide any telecommunication service, in the area in which the rural telephone company provides video programming. The limitation contained in this subparagraph shall not apply to a rural telephone company that is providing video programming on the date of enactment of the Telecommunications Act of 1996.

(2) SUSPENSIONS AND MODIFICATIONS FOR RURAL CARRIERS.—A local exchange carrier with fewer than 2 percent of the Nation's subscriber lines installed in the aggregate nationwide may petition a State for a suspension or modification of the application of a requirement or requirement of subsection (b) or (c) to telephone exchange service facilities specified in such petition. The State commission shall grant such petition to the extent that,

and for such duration as, the State commission determines that such suspension or modification—

(A) is necessary—

(i) to avoid a significant adverse economic impact on users of telecommunications services generally;

(ii) to avoid imposing a requirement that is unduly economically burdensome; or

(iii) to avoid imposing a requirement that is technically infeasible; and

(B) is consistent with the public interest, convenience, and necessity.

The State commission shall act upon any petition filed under this paragraph within 180 days after receiving such petition. Pending such action, the State commission may suspend enforcement of the requirements or requirements to which the petition applies with respect to the petition carrier or carriers.

(g) CONTINUED ENFORCEMENT OF EXCHANGE ACCESS AND INTERCONNECTION REQUIREMENTS.—On and after the date of enactment of the Telecommunications Act of 1996, each local exchange carrier, to the extent that it provides wireline services shall provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carriers on the date immediately preceding the date of enactment of the Telecommunications Act of 1996 under any court order, consent decree, or regulation, order, or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission

after such date of enactment. During the period beginning on such date of enactment and until such restrictions and obligations are so superseded, such restrictions and obligations shall be enforceable in the same manner as regulations of the Commission.

(h) DEFINITION OF INCUMBENT LOCAL EXCHANGE CARRIER.—

(1) DEFINITION.—For purposes of this section, the term "incumbent local exchange carrier" means, with respect to an area, the local exchange carrier that—

(A) on the date of enactment of the Telecommunications Act of 1996, provided telephone exchange service in such area; and

(B) (i) on such date of enactment, was deemed to be a member of the exchange carrier association pursuant to section 69.601(b) of the Commission's regulations (47 C.F.R. 69. 601(b)); or

(ii) is a person or entity that, on or after such date of enactment, became a successor or assign of a member described in clause (i).

(2) TREATMENT OF COMPARABLE CARRIERS AS INCUMBENTS.—The Commission may, by rule, provide for the treatment of a local exchange carrier (or class or category thereof) as an incumbent local exchange carrier for purposes of this section if—

(A) such carrier occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by a carrier described in paragraph (1);

(B) such carrier has substantially replaced an incumbent local exchange carrier described in paragraph (1); and

(C) such treatment is consistent with the public interest, convenience, and necessity and the purposes of this section.

(i) SAVINGS PROVISION.—Nothing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201.

47 U.S.C. § 252. PROCEDURES FOR NEGOTIATION, ARBITRATION, AND APPROVAL OF AGREEMENTS.

(a) AGREEMENTS ARRIVED AT THROUGH NEGOTIATIONS.—

(1) VOLUNTARY NEGOTIATIONS.—Upon receiving a request for interconnection, services, or network elements pursuant to section 251, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251. The agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement. The agreement, including any interconnection agreement negotiated before the date of enactment of the Telecommunications Act of 1996, shall be submitted to the State commission under subsection (e) of this section.

(2) MEDIATION.—Any party negotiating an agreement under this section may, at any point in the negotiation, ask a State commission to participate in the negotiation and to mediate any differences arising in the course of the negotiation.

(b) AGREEMENTS ARRIVED AT THROUGH COMPULSORY ARBITRATION.—

(1) ARBITRATION.—During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange receives a request for negotiation

under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues.

(2) DUTY OF PETITIONER.—

(A) A party that petitions a State commission under paragraph (1) shall, at the same time as it submits the petition, provide the State commission all relevant documentation concerning—

(i) the unresolved issues;

(ii) the position of each of the parties with respect to those issues; and

(iii) any other issue discussed and resolved by the parties.

(B) A party petitioning a State commission under paragraph (1) shall provide a copy of the petition and any documentation to the other party or parties not later than the day on which the State commission receives the petition.

(3) OPPORTUNITY TO RESPOND.—A non-petitioning party to a negotiation under this section may respond to the other party's petition and provide such additional information as it wishes within 25 days after the State commission receives the petition.

(4) ACTION BY THE STATE COMMISSION.—

(A) The State commission shall limit its consideration of any petition under paragraph (1) (and any response thereto) to the issues set forth in the petition and in the response, if any, filed under paragraph (3).

(B) The State commission may require the petitioning party and the responding party to provide

such information as may be necessary for the State commission to reach a decision on the unresolved issues. If any party refuses or fails unreasonably to respond on a timely basis to any reasonable request from the State commission, then the State commission may proceed on the basis of the best information available to it from whatever source derived.

(C) The State commission shall resolve each issue set forth on the petition and the response, if any, by imposing appropriate conditions as required to implement subsection (c) upon the parties to the agreement, and shall conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request under this section.

(5) REFUSAL TO NEGOTIATE.—The refusal of any other party to the negotiate to participate further in the negotiations, to cooperate with the State commission in carrying out its function as an arbitrator, or to continue to negotiate in good faith in the presence, or with the assistance, of the State commission shall be considered a failure to negotiate in good faith.

(c) STANDARDS FOR ARBITRATION.—In resolving by arbitration under subsection (b) any open issues and imposing conditions upon the parties to the agreement, a State commission shall—

(1) ensure that such resolution and conditions meet the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251;

(2) establish any rates for interconnection, services, or network elements according to subsection (d); and

(3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

(d) PRICING STANDARDS.—

(1) INTERCONNECTION AND NETWORK ELEMENT CHARGES.—Determinations by a State commission of the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251, and the just and reasonable rate for network elements for purposes of subsection (c)(3) of such section—

(A) shall be—

(i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding the interconnection or network element (whichever is applicable), and

(ii) nondiscriminatory, and

(B) may include a reasonable profit.

(2) CHARGES FOR TRANSPORT AND TERMINATION OF TRAFFIC.—

(A) IN GENERAL.—For the purposes of compliance by an incumbent local exchange carrier with section 251(b)(5), a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless—

(i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the carriers; and

(ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.

(B) RULES OF CONSTRUCTION.—This paragraph shall not be construed—

(i) to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements); or

(ii) to authorize the Commission or any State commission to engage in any rate regulation proceeding to establish with particularity the additional costs of transporting or terminating calls, or to require carriers to maintain records with respect to the additional costs of such calls.

(3) WHOLESALE PRICES FOR TELECOMMUNICATIONS SERVICES.—For the purposes of section 251(c)(4), a State commission shall determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.

(e) APPROVAL BY STATE COMMISSION.—

(1) APPROVAL REQUIRED.—Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.

(2) GROUNDS FOR REJECTION.—The State commission may only reject—

(A) an agreement (or any portion thereof) adopted by negotiation under subsection (a) if it finds that—

(i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or

(ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity; or

(B) an agreement (or any portion thereof) adopted by arbitration under subsection (b) if it finds that the agreement does not meet the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251, or the standards set forth in subsection (d) of this section.

(3) PRESERVATION OF AUTHORITY.—Notwithstanding paragraph (2) but subject to section 253, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

(4) SCHEDULE FOR DECISION.—If the State commission does not act to approve or reject the agreement within 90 days after submission by the parties of an agreement adopted by negotiation under subsection (a), or within 30 days after submission by the parties of an agreement adopted by arbitration under subsection (b), the agreement shall be deemed approved. No State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section.

(5) COMMISSION TO ACT IF STATE WILL NOT ACT.—If a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.

(6) REVIEW OF STATE COMMISSION ACTIONS.—In a case in which a State fails to act as described in paragraph (5), the proceeding by the commission under such paragraph and any judicial review of the Commission's actions shall be the exclusive remedies for s State commission's failure to act. In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 and this section.

(f) STATEMENTS OF GENERALLY AVAILABLE TERMS.—

(1) IN GENERAL.—A Bell operating company may prepare and file with a State commission a statement of the terms and conditions that such company generally offers within that State to comply with the requirements of section 251 and the regulations thereunder and the standards applicable under this section.

(2) STATE COMMISSION REVIEW.—A State commission may not approve such statement unless such statement complies with subsection (d) of this section and section 251 and the regulations thereunder. Except as provided in section 253, nothing in this section shall prohibit a State commission from establishing or enforcing other require-

ments of State law in its review or enforcing other requirements of State law in its review of such statement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

(3) SCHEDULE FOR REVIEW.—The State commission to which a statement is submitted, not later than 60 days after the date of such submission—

(A) complete the review of such statement under paragraph (2) (including any reconsideration thereof), unless the submitting carrier agrees to an extension of the period for review ; or

(B) permit such statement to take effect.

(4) AUTHORITY TO CONTINUE REVIEW.—Paragraph (3) shall not preclude the State commission from continuing to review a statement that has been permitted to take effect under subparagraph (B) of such paragraph or from approving or disapproving such statement under paragraph (2).

(5) DUTY TO NEGOTIATE NOT AFFECTED.—The submission or approval of a statement under this subsection shall not relieve a Bell operating company of its duty to negotiate the terms and conditions of an agreement under section 251.

(g) CONSOLIDATION OF STATE PROCEEDINGS.—Where not inconsistent with the requirements of this Act, a State commission may, to the extent practical, consolidate proceedings under sections 214(e), 251(f), 253, and this section in order to reduce administrative burdens on telecommunications carriers, other parties to the proceedings, and the State commission in carrying out its responsibilities under this Act.

(h) FILING REQUIRED.—A State commission shall make a copy of each agreement approved under subsection (e) and each statement approved under subsection (f) available for public in-

spection and copying within 10 days after the agreement or statement is approved. The State commission may charge a reasonable and non-discriminatory fee to the parties to the agreement or to the party filing the statement to cover the costs of approving and filing such agreement or statement.

(i) AVAILABILITY TO OTHER TELECOMMUNICATIONS CARRIERS.—A local exchange carrier shall make available any interconnection, service or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

(j) DEFINITION OF INCUMBENT LOCAL EXCHANGE CARRIER.—For purposes of this section, the term "incumbent local exchange carrier" has the meaning provided in section 251(h).

47 U.S.C. § 260. PROVISION OF TELEMESSAGING SERVICE.

(a) NONDISCRIMINATION SAFEGUARDS.—Any local exchange carrier subject to the requirements of section 251(c) that provides telemessaging service—

(1) shall not subsidize its telemessaging service directly or indirectly from its telephone exchange service or its exchange access; and

(2) shall not prefer or discriminate in favor of its telemessaging service operations in its provision of telecommunications services.

(b) EXPEDITED CONSIDERATION OF COMPLAINTS.—The Commission shall establish procedures for the receipt and review of complaints concerning violations of subsection (a) or the regulations thereunder that result in material financial harm to a provider of telemessaging service. Such procedures shall ensure that the Commission will make a final determination with respect to any such complaint within 120 days after receipt of the complaint. If the complaint contains an appropriate

showing that the alleged violation occurred, the Commission shall, within 60 days after receipt of the complaint, order the local exchange carrier and any affiliates to cease engaging in such violation pending such final determination.

(c) DEFINITION.—As used in this section, the term "telemessaging service" means voice mail and voice storage and retrieval services, any live operator services used to record, transcribe, or relay messages (other than telecommunications relay services), and any ancillary services offered in combination with these services.

47 U.S.C. § 261. EFECT ON OTHER REQUIREMENTS.

(a) COMMISSION REGULATIONS.—Nothing in this part shall be construed to prohibit the Commission from enforcing regulations prescribed prior to the date of enactment of the Telecommunications Act of 1996 in fulfilling the requirements of this part, to the extent that such regulations are not inconsistent with the provisions of this part.

(b) EXISTING STATE REGULATIONS.—Nothing in this part shall be construed to prohibit any State commission from enforcing regulations prescribed prior to the date of enactment of the Telecommunications Act of 1996, or from prescribing regulations after such date of enactment, in fulfilling the requirements of this part, if such regulations are not inconsistent with the provisions of this part.

(c) ADDITIONAL STATE REQUIREMENTS.—Nothing in this part precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are not inconsistent with this part or the Commission's regulations to implement this part.

28 U.S.C. § 2342. Jurisdiction of court of appeals

The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of—

(1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47;

(2) all final orders of the Secretary of Agriculture made under chapters 9 and 20A of title 7, except orders issued under sections 210(e), 217a, and 499g(a) of title 7;

(3) all rules, regulations, or final orders of—

(A) the Secretary of Transportation issued pursuant to section 2, 9, 37, 41, or 43 of the Shipping Act, 1916 (46 U.S.C.App. 802, 803, 808, 839, and 841a); and

(B) the Federal Maritime Commission issued pursuant to—

(i) section 23, 25, or 43 of the Shipping Act, 1916 (46 U.S.C.App. 822, 824, or 841a);

(ii) section 19 of the Merchant Marine Act, 1920 (46 U.S.C.App. 876);

(iii) section 2, 3, 4, or 5 of the Intercoastal Shipping Act, 1933 (46 U.S.C.App. 844, 845, 845a, or 845b);

(iv) section 14 or 17 of the Shipping Act of 1984 (46 U.S.C.App. 1713 or 1716); or

(v) section 2(d) or 3(d) of the Act of November 6, 1966 (46 U.S.C.App. 817d(d) or 817e(d)[1];

(4) all final orders of the Atomic Energy Commission made reviewable by section 2239 of title 42;

(5) all rules, regulations, or final orders of the Interstate Commerce Commission made reviewable by section 2321 of this title and all final orders of such Commission made reviewable under section 11901(j)(2) of title 49, United States Code;

(6) all final orders under section 812 of the Fair Housing Act; and

(7) all final agency actions described in section 202(f) of the Federal Railroad Safety Act of 1970.

Jurisdiction is invoked by filing a petition as provided by section 2344 of this title.

28 U.S.C. § 2343. Venue

The venue of a proceeding under this chapter is in the judicial circuit in which the petitioner resides or has its principal office, or in the United States Court of Appeals for the District of Columbia Circuit.

28 U.S.C. § 2344. Review of orders; time; notice; contents of petition; service

On the entry of a final order reviewable under this chapter, the agency shall promptly give notice thereof by service or publication in accordance with its rules. Any party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies. The

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[1] So in original. Probably should be followed by a closing parenthesis.

action shall be against the United States. The petition shall contain a concise statement of—

(1) the nature of the proceedings as to which review is sought;

(2) the facts on which venue is based;

(3) the grounds on which relief is sought; and

(4) the relief prayed.

The petitioner shall attach to the petition, as exhibits, copies of the order, report, or decision of the agency. The clerk shall serve a true copy of the petition on the agency and on the Attorney General by registered mail, with requests for a return receipt.

28 U.S.C. § 2347. Petitions to review; proceedings

(a) Unless determined on a motion to dismiss, petitions to review orders reviewable under this chapter are heard in the court of appeals on the record of the pleadings, evidence adduced, and proceedings before the agency, when the agency has held a hearing whether or not required to do so by law.

(b) When the agency has not held a hearing before taking the action of which review is sought by the petition, the court of appeals shall determine whether a hearing is required by law. After that determination, the court shall—

(1) remand the proceedings to the agency to hold a hearing, when a hearing is required by law;

(2) pass on the issues presented, when a hearing is not required by law and it appears from the pleadings and affidavits filed by the parties that no genuine issue of material fact is presented; or

(3) transfer the proceedings to a district court for the district in which the petitioner resides or has its principal office for a hearing and determination as if the proceed-

ings were originally initiated in the district court, when a hearing is not required by law and a genuine issue of material fact is presented. The procedure in these cases in the district court is governed by the Federal Rules of Civil Procedure.

(c) If a party to a proceeding to review applies to the court of appeals in which the proceeding is pending for leave to adduce additional evidence and shows to the satisfaction of the court that—

(1) the additional evidence is material; and

(2) there were reasonable grounds for failure to adduce the evidence before the agency:

the court may order the additional evidence and any counter-evidence the opposite party desires to offer to be taken by the agency. The agency may modify its findings of fact, or make new findings, by reason of the additional evidence so taken, and may modify or set aside its order, and shall file in the court the additional evidence, the modified findings or new findings, and the modified order or the order setting aside the original order.

28 U.S.C. § 2348: Representation in proceeding; intervention

The Attorney General is responsible for and has control of the interest of the Government in all court proceedings under this chapter. The agency, and any party in interest in the proceeding before the agency whose interest will be affected if an order of the agency is or is not enjoined, set aside, or suspended, may appear as parties thereto of their own motion and as of right, and be represented by counsel in any proceeding to review the order. Communities, associations, corporations, firms, and individuals, whose interests are affected by the order of the agency, may intervene in any proceeding to review the order. The Attorney General may not dispose of or discontinue the proceeding to review over the objection of any party or intervenor, but any inter-

venor may prosecute, defend, or continue the proceeding unaffected by the action or inaction of the Attorney General.

28 U.S.C. § 2349. Jurisdiction of the proceeding

(a) The court of appeals has jurisdiction of the proceeding on the filing and service of a petition to review. The court of appeals in which the record on review is filed, on the filing, has jurisdiction to vacate stay orders or interlocutory injunctions previously granted by any court, and has exclusive jurisdiction to make and enter, on the petition, evidence, and proceedings set forth in the record on review, a judgment determining the validity of, and enjoining, setting aside, or suspending, in whole or in part, the order of the agency.

(b) The filing of the petition to review does not of itself stay or suspend the operation of the order of the agency, but the court of appeals in its discretion may restrain or suspend, in whole or in part, the operation of the order pending the final hearing and determination of the petition. When the petitioner makes application for an interlocutory injunction restraining or suspending the enforcement, operation, or execution of, or setting aside, in whole or in part, any order reviewable under this chapter, at least 5 days' notice of the hearing thereon shall be given to the agency and to the Attorney General. In a case in which irreparable damage would otherwise result to the petitoner, the court of appeals may, on hearing, after reasonable notice to the agency and to the Attorney General, order a temporary stay or suspension in whole or in part, of the operation of the order of the agency for not more than 60 days from the date of the order pending the hearing on the application for the interlocutory injunction, in which case the order of the court of appeals shall contain a specific finding, based on evidence submitted to the court of appeals, and identified by reference thereto, that irreparable damage would result to the petitioner and specifying the nature of the damage. The court of appeals, at the time of hearing the applicaton for an interlocutory injunction, on a like find-

ing, may continue the temporary stay or suspension, in whole or in part, until decision on the application.

47 C.F.R § 51.315

§ 51.315 Combination of unbundled network elements.

(a) An incumbent LEC shall provide unbundled network elements in a manner that allows requesting telecommunications carriers to combine such network elements in order to provide a telecommunications service.

(b) Except upon request, an incumbent LEC shall not separate requested network elements that the incumbent LEC currently combines.

(c) Upon request, an incumbent LEC shall perform the functions necessary to combine unbundled network elements in any manner, even of those elements are not ordinarily combined in the incumbent LEC's network, provided that such combination is:

(1) Technically feasible; and

(2) Would not impair the ability of other carriers to obtain access to unbundled network elements or to interconnect with the incumbent LEC's network.

(d) Upon request, an incumbent LEC shall perform the functions necessary to combine unbundled network elements with elements possessed by the requesting telecommunications carrier in any technically feasible manner.

(e) An incumbent LEC that denies a request to combine elements pursuant to paragraph (c)(1) or paragraph (d) of this section must prove to the state commission that the requested combination is not technically feasible.

(f) An incumbent LEC that denies a request to combine elements pursuant to paragraph (c)(2) of this section must prove to the state commission that the requested combination would im-

pair the ability of other carriers to obtain access to unbundled network elements or to interconnect with the incumbent LEC's network.

APPENDIX G

[Filed June 10, 1999]

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 96-3321/3406/3410/3414/3416/3418/3424/3430/3436/3444/3450/3453/3460/3507/3520/3603/3604/3608/3696/3708/3709/3756/3901/3906/3982/3274

Iowa Utilities Board,

Petitioner,

v.

FCC, et.al,

Respondents.

On Remand From the Supreme Court of the United States

Before WOLLMAN, Chief Judge, BOWMAN and HANSON, Circuit Judges.

ORDER

This case has been reversed in part, affirmed in part, and remanded for further consideration by the Supreme Court of the United States, *see AT&T Corp. v. Iowa Utilities Board,* 525 U.S. ____, 119 S. Ct. 721 (1999), and the parties have filed numerous motions and suggestions as to how this court should now proceed, The court, having carefully considered the Supreme Court's opinion and the pending matters, now enters the following order.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. That portion of this court's judgment of July 18, 1997, as amended on rehearing October 14, 1997, and reported at

120 F.3d 753 (8th Cir. 1997)(hereafter "judgment"), which vacated the FCC's pricing rules found at 47 C.F.R. § 51.501-51.515 (inclusive), §51.601-51.611 (inclusive), and §51.701-51.717 (inclusive) is vacated. The previously vacated pricing rules, including those establishing "proxy prices" are reinstated. The court's previously issued mandate is amended accordingly.

2. That portion of the judgment which vacated 47 C.F.R. §51.089 (the "pick and choose" rule) is vacated, and the "pick and choose" rule is reinstated. The court's previously issued mandate is amended accordingly.

3. Those portions of the judgment which vacated 47 C.F.R. §51.303 (a rule regarding state commission review of preexisting interconnection agreements) and 47 C.F.R. §51.405 (a rule regarding rural exemptions) are vacated, and the cited rules are reinstated. The court's previously issued mandate is amended accordingly.

4. Pursuant to the mandate of the Supreme Court, 47 C.F.R. § 51.319 is vacated. See 119 S. Ct. at 736. This court's previously issued mandate is amended accordingly.

5. That portion of the judgment which vacated 47 C.F.R. § 51.315(b) is vacated, and the cited rule is reinstated. The court's previously issued mandate is amended accordingly.

6. That portion of the judgment which vacated paragraphs 121-128 of the FCC's *First Report and Order* dealing with the FCC's authority under Section 208 is vacated because the Supreme Court held that the issues were not ripe for this court's review, and those previously vacated paragraphs are reinstated. The court's previously issued mandate is amended accordingly.

7. The following schedule for the briefing and oral argument of those issues remaining and as yet undisposed of is established:

a. Friday, July 16, 1999

Petitioners' and Supporting Intervenors' supplemental opening briefs are due on the remaining issues not reached in this court's first opinion, including the continuing validity and potential disposition of 47 C.F.R. § 51.317. The briefs should also address whether or not, in light of the Supreme Court's decision, this court should take any further action with respect to §§ 51.305(a)(4) and 51.311(c) (the "superior quality" rules) and § 51.315(c)-(f) (unbundling rules). **Any issue the merits of which this court did not address in its initial opinion because of its ruling on the jurisdictional issue(s) must be separately and individually identified and argued in the supplemental briefs, or the issue will be deemed waived.** The joint brief of the Petitioners and the joint brief of the Intervenors in support of the Petitioners together are limited to a combined length of 28,000 words to be divided amongst the parties as they may agree.

b. Monday, August 16, 1999

The opening joint brief of the FCC and the United States (Federal Respondents) is due, limited to 28,000 words. A single joint brief by Intervenors in support of the Federal Respondents is also due, limited to 14,000 words divided among those Intervenors as they may agree.

c. Tuesday, August 31, 1999

Reply Briefs from the Petitioners and their supporting Intervenors are due, not to exceed 14,000 words total to be divided among those parties as they may agree. Petitioners shall file a joint reply brief, and the Intervenors in support of the Petitioners shall file a joint reply brief.

d. Friday, September 17, 1999

Oral argument is set for **8:30 a.m., Friday, September 17, 1999,** in **St. Louis, Missouri** under the following time limitations: 45 minutes opening argument for the Petitioners and the Intervenors in Support of the Petitioners to be divided among themselves as the parties may agree; 45 minutes

argument time for the Federal Respondents and the Intervenors in Support of the Federal Respondents to be divided among themselves as the parties may agree; 20 minutes rebuttal time for the Petitioners.

Order Entered at the Direction of the Court;

Clerk, U.S. Court of Appeals, Eighth Circuit.

Supreme Court, U.S.
FILED
JUN - 2 2000
CLERK

No. 99-1641

IN THE

SUPREME COURT OF THE UNITED STATES

US WEST COMMUNICATIONS, INC.,

Petitioner,

v.

MFS INTELENET, INC., ET AL.

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT WASHINGTON UTILITIES & TRANSPORTATION COMMISSION'S BRIEF IN OPPOSITION

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INTRODUCTION

Petitioner US West Communications, Inc. ("US West") urges this Court to grant its Petition for a Writ of Certiorari, arguing that there is a conflict between two United States Courts of Appeals regarding the applicability of the Hobbs Act, 28 U.S.C. §§ 2342, *et seq.*, to rules promulgated by the Federal Communications Commission ("FCC"). This case has little if anything to do with the Hobbs Act and dueling federal court jurisdiction. Rather, it involves a straightforward implementation of the pro-competitive policies of the Telecommunications Act of 1996, 47 U.S.C. §§ 151, *et seq.* ("1996 Act"), by the Washington Utilities and Transportation Commission ("WUTC"). State commissions, such as the WUTC, are charged by the 1996 Act to effect the obligation of incumbent companies, like US West, to interconnect their facilities with new competitors in the local telecommunications market, like MFS Intelenet, Inc. ("MFS"). The Court should deny the Petition.

STATEMENT

A. The Requirement for Interconnection Among Telecommunications Companies Under the Telecommunications Act of 1996

This case arose out of the procedure under the 1996 Act by which incumbent local exchange telecommunications companies (incumbent companies), such as US West, are required to enter into "interconnection agreements" with their competitors, such as MFS.[1] The 1996 Act requires incumbents to enter into interconnection agreements with their competitors under which competitors may acquire

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[1]The purpose of the Telecommunications Act of 1996 is to "provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition . . . ." H.R. Conf. Rep. No. 104-458, 104th Cong., 2d Sess. 113 (1996); *see AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371-72 (1999).

access to elements of the incumbents' telecommunications networks so they can compete with the incumbents in the local telecommunications market. 47 U.S.C. § 251(c)(3).

These interconnection agreements must contain the particular terms and conditions necessary for the incumbents to fulfill their statutory duties. *Id.* § 251(c)(1). Congress assigned to state public utility commissions, like the WUTC, the primary role in implementing the interconnection agreements. For example, though the incumbent company and the competitors are required to negotiate interconnection agreements in good faith, *id.*, if the parties are unable to resolve all issues through negotiation, a party to the negotiation may request the state commission to arbitrate the open issues. *Id.* § 252(b)(1).[2]

In addition to their role as arbitrators under the 1996 Act, state commissions must approve all interconnection agreements, regardless of whether the agreements are reached through negotiation or arbitration. *Id.* § 252(e)(1). However, the statutory criteria the state commission must apply in its review of an agreement differ depending on whether the agreement, or portion of the agreement, was reached by negotiation or arbitration. Regarding negotiated agreements, a state commission may reject such an agreement, "or any portion thereof," only if the agreement or provision discriminates against a carrier not a party to the agreement or if the agreement or provision is not consistent with the public interest, convenience, or necessity. *Id.* § 252(e)(2)(A). On the other hand, if the agreement or provision was arbitrated, the state commission has somewhat wider latitude. In that situation, the state commission may reject the agreement or provision only if "it finds that the agreement does not meet the requirements of section 251 [of

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[2]The WUTC is authorized by the Washington state legislature to take actions, conduct proceedings, and enter orders as permitted or contemplated for state commissions under the 1996 Act. Wash. Rev. Code § 80.36.610(1).

the 1996 Act], including the regulations prescribed by the Commission [FCC] pursuant to section 251, or the standards set forth in subsection (d) of this section." *Id.* § 252(e)(2)(B). The 1996 Act also preserved the authority of a state commission to establish or enforce "other requirements of State law in its review of an agreement . . . ." *Id.* § 252(e)(3).[3]

The 1996 Act specifically preempted state court review of a state commission action, *id.* § 252(e)(4), and assigned the task of judicial review of state commission decisions to the United States District Court. *Id.* § 252(e)(6) ("[A]ny party aggrieved by such [state commission] determination may bring an action in an appropriate Federal district court to determine whether the agreement or

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[3]In 1985, the Washington state legislature passed the Regulatory Flexibility Act, Laws of 1985, ch. 450, p. 1976, codified at several places in Title 80 Wash. Rev. Code, which authorized easy registration of telecommunications companies seeking to operate in Washington. It further set forth a specific process by which companies may seek classification as a competitive company or seek to have one or more services designated "competitive," Wash. Rev. Code §§ 80.36.320, .330, and declared the state policy to promote diversity of supply for telecommunications services. *Id.* § 80.36.300(5).

In 1994, the Washington Supreme Court removed a historical barrier to local telephone competition by rejecting arguments that exclusive franchise service areas in the telecommunications industry were the law in Washington. *Electric Lightwave, Inc. v. Utilities & Transp. Comm'n*, 123 Wn.2d 530, 869 P.2d 1045 (1994). The court recognized that granting monopolies would run counter to state legislative policy promoting competition. *Id.* at 538-39 (citing Wash. Rev. Code § 80.36.300(5)).

Foreshadowing the 1996 Act, in order to foster emerging local competition, the WUTC entered an order setting forth the terms and conditions under which competitors for local exchange service will interconnect their networks with incumbents. *WUTC v. US West Communications, Inc., et al.*, Consolidated Docket Nos. UT-941464, -941465, -950146, -950265, 1995 WL 735315 (WUTC Oct. 31, 1995) (petition for judicial review stayed, King County Superior Court, No. 96-2-08435-2SEA). In this order, the WUTC determined that the transition to competitive markets would be accomplished largely through access to unbundled network elements and resale of services. *Id.* at *40-41. Therefore, the WUTC exercises its role to effect the pro-competitive policies, both under the 1996 Act and under pre-existing state law.

statement meets the requirements of section 251 and this section.").

This case is the result of a challenge by US West to the WUTC's approval of the interconnection agreement between US West and MFS, negotiated in part and arbitrated in part, and the subsequent review of that approval in the district court. Though the challenge was broad-based, the issue presented to this Court involves the relationship and status of certain FCC rules to the agreement and the lower court decisions affirming the WUTC.

B. The FCC's Local Competition Rules and the *Iowa Utilities Board* Litigation Before the Eighth Circuit and This Court

In approving an arbitrated agreement, the state commission must determine if it conforms with FCC rules. 47 U.S.C. § 252(e)(2)(B).[4] Following the passage of the 1996 Act, the FCC promulgated regulations to implement the local competition provisions of the Act, including those relating to interconnection. *See In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd. 15499 (August 8, 1996) ("Local Competition Order"). These regulations specified which telecommunications "network elements" an incumbent must make available to its competitors. A network element is a facility or equipment used in the provision of a telecommunications service. 47 U.S.C. § 153(29). For example, a "switch" routes the call and is connected to the local "loop," which runs from a customer's place of use to the switch.[5] Under the Act, these

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[4]However, with regard to agreements, or portions of agreements, that are adopted by negotiation, the state commission need not so apply FCC rules. Rather, in such cases, the state commission may reject the agreement, or portion thereof, only if it determines that it is not consistent with the public interest. 47 U.S.C. § 252(e)(2)(A).

[5]Simply speaking a "switch" is "a mechanical, electrical or electronic device which opens or closes circuits, completes or breaks an electrical path, or

elements must be "unbundled" and provided to competitors "in a manner that allows requesting carriers to combine such elements in order to provide . . . telecommunications service." 47 U.S.C. § 251(c)(3).

In these rules, the FCC imposed at least three separate provisioning requirements. First, it required incumbents to provide unbundled network elements in a manner that would allow competitors to combine the elements in order to provide a finished service, 47 C.F.R. § 51.315(a) ("finished service rule"). Second, it prohibited incumbents from separating already-combined network elements, unless otherwise requested by competitors. *Id.* § 51.315(b) ("no separation rule"). Finally, the FCC required incumbents to combine network elements at the request of competitors. *Id.* § 51.315(c)-(f) ("mandatory combination rule"). It is the mandatory combination rule that is the focus of US West's argument.

Numerous parties, including US West, petitioned for judicial review of the Local Competition Order. These cases were consolidated in the Eighth Circuit Court of Appeals. On September 27, 1996, the Eighth Circuit temporarily stayed the entire body of the FCC's rules. *Iowa Utils. Bd. v. Federal Communications Comm'n*, 109 F.3d 418, 421 (8th Cir. 1996). Ultimately, the Eighth Circuit stayed only selected rules but left the finished service, no separation, and mandatory combination rules intact. *Id.* at 427 & n.8.[6]

In its review of the FCC's rules, the Eighth Circuit vacated the mandatory combination rule, 47 C.F.R. §

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selects paths or circuits." NEWTON'S TELECOM DICTIONARY, 757 (15th ed. 1999). The "local loop" is the physical connection from the customer's premises to the local exchange company's central office. *Id.* at 465.

[6]The Eighth Circuit stayed the FCC's rules establishing pricing guidelines for state commissions and the so-called "pick and choose" rules by which the FCC allowed competitors to incorporate selective portions of interconnection agreements between the incumbent and other competitors into their own agreements with the incumbent. *Iowa Utils. Bd.*, 109 F.3d at 421.

51.315(c)-(f). *Iowa Utils. Bd. v. Federal Communications Comm'n*, 120 F.3d 753, 813 (8th Cir. 1997). On rehearing, the Eighth Circuit also vacated Rule 315(b), the no separation rule. *Id.* The court vacated these rules for two reasons. First, it held that the 1996 Act could not be read to require incumbents to combine elements. Second, it compared the provisions in the 1996 Act that established how an incumbent company would be compensated for unbundled elements and finished services. *Iowa Utils. Bd.*, 120 F.3d at 813. Under the 1996 Act, incumbents must provide unbundled elements at cost-based rates, and finished services at retail prices less a wholesale discount. *Id.; see also* 47 U.S.C. § 252(d)(1), (3). The court opined that requiring access to combined elements at cost-based rates for unbundled access would "obliterate" the pricing distinctions between these two means by which competitors could use the incumbent's network to provide competitive service. *Iowa Utils. Bd.*, 120 F.3d at 813. However, the Eighth Circuit affirmed the FCC's determination that competitors may obtain the ability to provide finished services entirely through access to unbundled network elements as "consistent with the plain meaning and structure of the Act." *Id.* at 815; *see also* 47 U.S.C. § 251(c)(3); 47 C.F.R. § 51.315(a).

On January 25, 1999, this Court affirmed in part and reversed in part the Eighth Circuit's decision. *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999). With respect to the FCC's no separation rule, the Supreme Court reversed the Eighth Circuit's decision that Rule 315(b) violates the Act and reinstated that rule. *Iowa Utils. Bd.*, 525 U.S. at 393-95. The Court rejected the argument that the Act requires competitors to combine network elements for themselves. The Court remanded the case to the Eighth Circuit for "proceedings consistent with" the opinion. *Id.* at 397.

However, this Court did not rule on the mandatory combination provision in *Iowa Utilities Board*. On remand, the Eighth Circuit has heard arguments on whether it should

reexamine its earlier holding of whether the mandatory combination rule is invalid. *See* Pet. App. 114a. That forum is the appropriate one, in the first instance, to make the determination.[7] In any event, for the purposes of this Petition, we can assume that, at least for the near future, the mandatory combination rule is not in force.

C. Proceedings Below

1. Negotiations Between the Parties and Arbitration of Unresolved Issues Before the WUTC

On February 8, 1996, MFS requested negotiations with US West for interconnection under the Act. On June 24, 1996, MFS filed a petition with the WUTC requesting arbitration of unresolved issues pursuant to 47 U.S.C. § 252(b)(1). Pet. App. 40a.

The WUTC adopted "final offer" arbitration, whereby the arbitrator resolved the disputed issues between US West and MFS by selecting between the parties' last proposals as to each unresolved issue, selecting the proposal that was the most consistent with the requirements of the Act, state law and WUTC policy. Pet. App. 41a. Under this method of arbitration, the parties have the incentive to approach a middle ground. If neither party submitted a final offer that complied with applicable law or policy, the arbitrator would resolve the disputed issue in a manner to assure such compliance. Only the disputed issues were before the arbitrator for decision. Pet. App. 41a-42a. Negotiated issues

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[7]Before the Ninth Circuit, US West argued that in the *Iowa Utilities Board* litigation no party appealed the Eighth Circuit's invalidation of the mandatory combination rule, so, for the purposes of this litigation, it is presumed invalid. US West's Pet. for Reh'g and Pet. for Reh'g En Banc, at 5. MFS disagreed, arguing before the Ninth Circuit that the mandatory combination rule was presented to the Supreme Court, but this Court did not rule on it. MFS' Resp. Pet. for Reh'g and Pet. for Reh'g En Banc, at 5 n.2. However, that debate is irrelevant to the issues presented in this Petition.

were not subject to arbitration, but were subject to WUTC approval. 47 U.S.C. § 252(e)(1).

Among the issues negotiated by the parties was the provision regarding combination of network elements that is at issue in this Petition. In that provision, US West and MFS agreed that US West would combine network elements for MFS and MFS would pay for that service.[8] Because the 1996 Act permits state commissions to arbitrate only unresolved issues, this provision was not before the arbitrator for resolution or modification. 47 U.S.C. § 252(b)(1), (4)(a). However, in addition to this negotiated provision, US West proposed the following language to limit the network configuration responsibilities it volunteered to undertake on behalf of MFS: "USWC [US West] will not combine USWC's Unbundled Loops with USWC's Unbundled Switching Element to provide a finished service to MFS." App. 6a; Pet. App. 55a. US West based this proposal on its belief that the Act did not permit competitive companies to provide a finished service by combining network elements

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[8]That provision states:

> "USWC [US West] will not restrict the types of telecommunications services MFS may offer through unbundled elements, nor will it restrict MFS from combining elements with any technically compatible equipment the [sic] MFS own. USWC will provide MFS with all of the functionalities of a particular element, so that MFS can provide any telecommunications services that can be offered by means of the element. *USWC agrees to perform and MFS agrees to pay for the functions necessary to combine the requested elements in any technically feasible manner either with other elements from USWC's network, or with elements possessed by MFS.* However, USWC need not combine elements in any manner requested if not technically feasible, but must combine elements ordinarily combined in its network in the manner they typically are combined." App. 8a-9a (emphasis added).

The agreement, as approved by the WUTC, contains this negotiated provision. App. 2a-3a.

purchased from incumbents. Pet. App. 55a-57a. US West called this practice "sham unbundling." *Id.* at 55a-56a.

Although the finished service rule was in effect during the course of the arbitration, US West nevertheless urged the arbitrator to include the above language to prevent MFS from providing basic exchange service entirely through unbundled elements obtained from US West. Pet. App. 55a-57a; *see also* 47 C.F.R. § 51.315(a). US West urged the arbitrator to ignore the FCC's order on the theory that it was *ultra vires* and that the WUTC has independent state authority to reject it. App. 10a-13a; *see also* 47 C.F.R. § 51.315(a), First Report and Order, ¶ 328. The arbitrator rejected this proposed provision, relying primarily on the plain language of 47 U.S.C. § 251(c)(3), and secondarily on 47 C.F.R § 51.315(a). Pet. App. 56a-57a.

At the conclusion of the arbitration, the parties restated their objections to the arbitrator's decision in oral argument before the commissioners of the WUTC. The WUTC approved the agreement, including the negotiated provision requiring US West to combine network elements for MFS. Pet. App. 37a-38a.[9] Because that provision was negotiated, the WUTC's authority to reject it was strictly limited to (1) whether the provision discriminates against a telecommunications carrier not a party to the agreement, or (2) whether the provision is inconsistent with the public

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[9]In its Petition, US West incorrectly states that:

> "[T]he arbitrator imposed a condition consciously modeled on the FCC reconfiguration rules, requiring US WEST 'to perform . . . the functions necessary to combine requested elements in *any* technically feasible manner either with other elements from [US WEST's] network, or with elements possessed by MFS,' whether or not those combinations exist in US WEST's own network." Pet. at 7 (citing Pet. App. 12a n.7).

US West is incorrect in stating that the arbitrator imposed this requirement; US West agreed to it. Neither the arbitrator nor the WUTC imposed any requirement on US West that it combine network elements at the request of MFS pursuant to 47 C.F.R. § 51.315(c)-(f) or any other provision of law.

interest, convenience, and necessity. 47 U.S.C. § 252(e)(2)(A). US West did not argue that the provision should have been rejected.

2. Federal Court Review of the WUTC's Arbitration Decision

Pursuant to 47 U.S.C. § 252(e)(6), US West challenged the WUTC's decision approving the interconnection agreement in the district court, and disputed a whole host of provisions in the agreement. *See* Pet. App. 27a-30a. While the case was pending before the district court, the Eighth Circuit vacated the FCC's mandatory combination rule and the no separation rule. *See Iowa Utils. Bd.*, 120 F.3d at 813; *see also* 47 C.F.R. § 51.315(b)-(f). Nevertheless, the district court affirmed the WUTC's approval of the provision in the agreement, noting that "the reasoning that led to [the Eighth Circuit's holding] does not apply here." Pet. App. 28a-29a. The district court held that the "Eighth Circuit emphasized that compelled recombination would undermine the difference between wholesale prices finished service and the 'at-cost' price paid for network elements." *Id.* at 29a (citing 120 F.3d at 813). The district court noted that "any unfair cost arbitrage is precluded by use of a recombination fee equal to the difference between cost and the wholesale rate for finished service." Pet. App. 29a. In other words, the district court distinguished between a mandatory rule requiring combination in all cases, which the Eighth Circuit invalidated, and a provision, agreed to in the context of a negotiation, that required the incumbent to combine elements in consideration for payment by the competitor.

US West appealed the district court's decision regarding the combination provision to the Ninth Circuit. While this case was pending before that court, this Court issued its opinion in *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999). In that decision, this Court overturned the Eighth Circuit's invalidation of 47 C.F.R. § 51.315(b). 525

U.S. at 393-95. Relying on this Court's interpretation of 47 U.S.C. § 251(c)(3) as set forth in *Iowa Utilities Board*, the Ninth Circuit affirmed the combination provision negotiated by US West and MFS. *US West Communications, Inc. v. MFS Intelenet, Inc.*, 193 F.3d 1112, 1121 (9th Cir. 1999); Pet. App. 12a-14a. However, the Ninth Circuit articulated its rationale differently than the district court. With this Court's reinstatement of the no separation rule in mind, the court upheld the provision in the agreement requiring US West to combine network elements as being consistent with the 1996 Act.

REASONS FOR DENYING THE PETITION

I. There Is No Conflict Between the Courts of Appeals Regarding the Applicability of the Hobbs Act to the FCC's Local Competition Rules

US West urges this Court to grant its Petition because, it alleges, the Ninth Circuit acted in effect to review an FCC rule, 47 C.F.R. § 51.315(c)-(f), the validity of which has been and currently is under review by the Eighth Circuit and, therefore, the Ninth Circuit's action was in violation of the Hobbs Act, which confers exclusive jurisdiction upon the Eighth Circuit for review of that rule. Pet. at 9-16.

The focus of US West's argument is that there is a conflict between the decision of the Ninth Circuit in this case and the decision of the Fourth Circuit in *GTE South, Inc. v. Morrison*, 199 F.3d 733 (4th Cir. 1999). Pet. at 14-15. However, there is no conflict.

The Fourth Circuit in *GTE South* and the Ninth Circuit below both interpreted the Hobbs Act in the same way. In *GTE South*, GTE (an incumbent provider) directly asked the Fourth Circuit to declare that binding FCC rules violate the 1996 Act.[10] The Fourth Circuit refused to

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[10]GTE was a party in an arbitration before the Virginia State Corporation Commission ("SCC") pursuant to the Act. The SCC had established prices for interconnection, unbundled network elements, and wholesale services.

invalidate the FCC's pricing rules because the Eighth Circuit was reviewing the rules pursuant to the Hobbs Act. *GTE South*, 199 F.3d at 743. In fact, the Fourth Circuit cited the Ninth Circuit's decision in this case in support of its refusal to review binding FCC rules. *Id.* (*citing US West Communications, Inc.*, 193 F.3d at 1122-23 (9th Cir. 1999)). The Ninth Circuit ruled it could not review FCC rules or orders in response to US West attacks on the FCC's rules requiring telephone number portability,[11] and the FCC's order regarding reciprocal compensation for telephone traffic bound for internet service providers ("ISPs").[12] 193 F.3d 1120-21, 1122-23; Pet. App. 10a-12a, 15a-18a. US West urged the Ninth Circuit to overturn the interim number portability provisions in the US West/MFS agreement. 193 F.3d at 1120-21; Pet. App. 10a-11a. Like the Fourth Circuit, the Ninth Circuit refused to allow US West to circumvent the Hobbs Act's mandate that challenges to FCC orders must be brought before the circuit courts. *Id.* (citing 28 U.S.C. §§ 2342, 2344). The Ninth Circuit also refused to accept US West's challenge to the FCC's order regarding ISP-bound traffic because that order can be reviewed only in accordance

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By the time the SCC arbitrated the matter, the FCC's pricing rules had been stayed by the Eighth Circuit. *GTE South*, 199 F.3d at 738. Relying on the pricing standards set forth in 47 U.S.C. §§ 251 and 252, the SCC established the prices. *Id.* The prices also largely conformed to the FCC's pricing rules, which were stayed and then vacated by the Eighth Circuit. *See GTE South*, 199 F.3d at 738-40; *see also* 47 C.F.R. §§ 51.501-611. GTE appealed the SCC's decision pursuant to 47 U.S.C. § 252(e)(6). The district court found that the pricing methodology used by the SCC complied with the Act and affirmed the decision. *GTE South*, 199 F.3d at 739 (citing *GTE South, Inc. v. Morrison*, 6 F. Supp. 2d 517 (E.D. Va. 1998)). GTE appealed that decision to the Fourth Circuit. *Id.* In the meantime, this Court overruled the Eighth Circuit's decision to vacate the FCC's pricing rules on jurisdictional grounds. *Id.*

[11] *In Re Telephone Number Portability*, 11 FCC Rcd. 8352 (July 2, 1996).

[12] *See In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996: Inter-Carrier Compensation for ISP-Bound Traffic*, 14 FCC Rcd. 3689 (Feb. 26, 1999) ("ISP order").

with the Hobbs Act. 193 F.3d at 1122 (citing 28 U.S.C. § 2342).[13]

Indeed, the Hobbs Act is not implied at all. Contrary to the argument of US West, the Ninth Circuit did not engage in judicial review of the FCC's mandatory combination rule set forth at 47 C.F.R. § 51.315(c)-(f). By operation of the Hobbs Act, only the Eighth Circuit has jurisdiction "to enjoin, set aside, suspend . . . or to determine the validity of" that rule. 28 U.S.C. § 2342. However, the Ninth Circuit purported to do none of those. In fact, the Ninth Circuit's decision is premised on the fact that Rules 315(c)-(f) are invalid. The invalidation of Rules 315(c)-(f) simply left no rule in place requiring incumbent carriers to combine elements. Because there was no FCC requirement that combination is the rule in all cases, the question then became did the 1996 Act, in the absence of any rule, prohibit state commissions from approving interconnection agreements containing a *negotiated* provision that required an incumbent to combine elements for a fee. The Ninth Circuit held that it did not. Because the FCC's combination rules were not before the Ninth Circuit for interpretation or enforcement, that court did not usurp the Eighth Circuit's authority to review the rules.

The cases cited by US West are not on point. All of the cases cited by US West involve facts where the parties sought rulings from courts that would invalidate or vacate binding agency rules or orders – sidestepping Hobbs Act review.[14] The critical distinction between the cases cited by

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[13]The Ninth Circuit noted that US West, and other parties, have filed petitions for direct review of the FCC's ISP order in the D.C. Circuit. 193 F.3d at 1122 n.12.

[14]*See* Pet. at 12-13 (citing *FCC v. ITT World Communications*, 466 U.S. 463, 468 (1984); *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 69-70 (1984); *Wilson v. A.H. Belo Corp.*, 87 F.3d 393, 399-400 (9th Cir. 1996); *Brotherhood of Locomotive Eng'rs v. Boston & Maine Corp.*, 788 F.2d 794, 801 (1st Cir. 1986); *Yellow Forwarding Co. v. Atlantic Container Line*, 668 F.2d 350, 354 (8th Cir. 1981); *Air Transport Ass'n v. Public*

US West and the instant case is that the Ninth Circuit did not invalidate or vacate a valid FCC rule or order. [15]

In sum, unlike US West's collateral attack on the FCC's number portability rule and ISP order, the Ninth Circuit's decision regarding the combination provision in the agreement does not implicate the Hobbs Act. In reviewing the combination provision, the Ninth Circuit was not interpreting, enforcing, or reviewing binding FCC rules. Rather, the Ninth Circuit interpreted the 1996 Act, as guided by this Court's decision in *Iowa Utilities Board*, and determined that the negotiated combination provision does not violate the Act.

Utils. Comm'n, 833 F.2d 200, 206 (9th Cir. 1987); *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 738 F.2d 901 (1984), *vacated on other grounds* 476 U.S. 1167 (1986)).

[15]US West also argues that the Ninth Circuit's interpretation of the Hobbs Act conflicts with decisions of several district courts. Pet. at 15, n.7. US West is wrong. In *AT&T Communications of the Southwest, Inc. v. Southwestern Bell Tel. Co.*, 86 F. Supp. 2d 932, 960-61 (W.D. Mo. 1999), the district court said it would be inclined to vacate 47 C.F.R. § 51.317, a binding FCC rule, if it had the authority to do so. The court concluded that it did not have the jurisdiction to overrule a valid FCC regulation. *Id.* at 961. Similarly, the district court in *Michigan Bell Tel. Co. v. Strand*, 26 F. Supp. 2d 993, 999-1000 (W.D. Mich. 1998), held that it could not entertain arguments that would effectively challenge the validity of the FCC's determination that shared transport is a network element that incumbents must provide to competitive companies. The Eighth Circuit had affirmed that rule and the district court could not invalidate an FCC rule that the Eighth Circuit had affirmed on Hobbs Act review. *See id.* at 1000. In both cases, the district courts refused to invalidate binding FCC rules, just as the Ninth Circuit had refused to invalidate the FCC's binding number portability and ISP orders.

II. The Ninth Circuit's Decision to Affirm the Combination Provision Negotiated by US West and MFS Will Not Threaten the Primacy and Uniformity of Federal Law. The Combination Provision US West Agreed to Include in the Agreement Does Not Undermine the Telecommunications Act of 1996

As part of its Hobbs Act claim, US West argues that the Ninth Circuit's decision to affirm the combination provision negotiated by US West and MFS will "threaten the primacy and uniformity of federal law under the Telecommunications Act." Pet. at 16. This is wrong for two reasons. First, as stated above, there is no conflict between the courts of appeals.[16] Second, the Ninth Circuit's decision represents exactly what Congress intended when it provided for federal court review over state commission arbitration decisions. *See* 47 U.S.C. § 252(e)(6).

Congress did not structure the Act to provide for review of state commission decisions in a single federal district court. Rather, Congress permitted parties aggrieved by state commission determinations to bring an action in the "appropriate" federal district court. *Id.* Therefore, Congress contemplated that several district courts would review interconnection agreements to determine whether the agreements meet the requirements of Sections 251 and 252 of the Act. *Id.*

While uniformity of federal law is an important consideration, federal district courts are not bound by the decisions issued by other district courts. *See, e.g., Fox v. Acadia State Bank*, 937 F.2d 1566, 1570 (11th Cir. 1991) (district court is not bound by another district court's

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[16]US West premises this part of its argument on its assumption that "both the state regulator and the federal court are free to *ignore* the vacation of the [mandatory combination] rules by a Hobbs Act court." Pet. at 16. As explained above, neither the WUTC nor the lower courts did any such thing.

decision, or even an opinion by another judge of the same district); *Colby v. J.C. Penney Co., Inc.* 811 F.2d 1119, 1123 (7th Cir. 1987) ("[N]either this court nor the district courts of this circuit give the decisions of other courts of appeals automatic deference; we recognize that, within reason, the parties to cases before us are entitled to our independent judgment."). Congress was well aware that district courts are not bound by the decisions of other courts when it provided for review of state commission decisions in the several federal district courts.

One of the policies behind the Hobbs Act is to ensure that judicial review of federal agency action is conducted by a single circuit court, rather than by many district courts. *See Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 738 F.2d 901, 906-07 (1984), *vacated on other grounds* 476 U.S. 1167 (1986). However, this policy of uniform judicial review of federal *rules* does not mean that federal courts must blindly adhere to a sister court's interpretation of federal *statutes*. The Ninth Circuit is not bound by the Eighth Circuit's interpretation of the Telecommunications Act of 1996, especially when this Court has called into question the Eighth Circuit's reading of the 1996 Act. *See Iowa Utils. Bd.*, 525 U.S. at 393-95.

Even if the Eighth Circuit, on remand, were to decline to reconsider its earlier decision vacating the FCC's mandatory combination rule, the Ninth Circuit's decision would stand. Such a decision by the Eighth Circuit would simply mean that there is no FCC rule that would require incumbents to combine elements at the request of competitive companies, it would not mean that the combination provision in the interconnection agreement between US West and MFS violates the Act.

US West's argument that the Ninth Circuit's decision upsets uniform federal law is nothing more than an argument that the Ninth Circuit must automatically defer to another

circuit's interpretation of the 1996 Act. That argument is simply wrong and does not warrant review by this Court.

III. The Ninth Circuit Did Not Decide That the *Iowa Utilities Board* Decision Revived the FCC's Combination Rules. Rather, the Ninth Circuit Correctly Decided that the 1996 Act Does Not Preclude an Incumbent Carrier From Combining Network Elements on Behalf of Its Competitors

US West also argues that the Ninth Circuit determined that this Court in *Iowa Utilities Board* revived the FCC's mandatory combination rule. Pet. at 19. The Ninth Circuit did not.

Before the Ninth Circuit, US West alleged that the combination provision in the interconnection agreement violates the Act. In light of this argument, the Ninth Circuit considered whether the combination provision was consistent with US West's duty to:

> "provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service." 47 U.S.C. § 251(c)(3).

See also 193 F.3d at 1121; Pet. App. 12a-14a. At the time the Ninth Circuit reviewed the combination provision, the FCC's mandatory combination rule had been vacated by the

Eighth Circuit. *Iowa Utils. Bd.*, 120 F.3d 813. Because of the continued invalidity of the FCC's combination rule, there currently is no binding FCC rule that would require or prohibit US West from combining network elements on behalf of US West. Therefore, the Ninth Circuit's decision was based on its reading of 47 U.S.C. § 251(c)(3), and not based on its reading of a "revived" FCC rule.

US West argues that the Ninth Circuit was wrong when it held that this Court's decision in *Iowa Utilities Board* undermined the Eighth Circuit's rationale for vacating 47 C.F.R. § 51.315(c)-(f). *See* Pet. at 19; 193 F.3d at 1121; Pet. App. 12a-14a. However, the Ninth Circuit's interpretation of 47 U.S.C. § 251(c)(3) is consistent with this Court's interpretation of the statute.

When it reviewed the FCC's combination rules, the Eighth Circuit held that the 1996 Act could not be read to require incumbent companies to provide network elements in combinations, regardless of who did the actual combining.

> "[T]he Commission's rule, 47 C.F.R. § 51.315(b), which prohibits an incumbent LEC from separating network elements it may currently combine, is contrary to [47 U.S.C.] § 251(c)(3) because the rule would permit the new entrant access to the incumbent LEC's network elements on a bundled rather than an unbundled basis." 120 F.3d at 813.

The Eighth Circuit also held that 47 U.S.C. § 251(c)(3) "*unambiguously* indicates that the requesting carriers will combine the network elements themselves." *Iowa Utils. Bd.*, 120 F.3d at 813 (emphasis added). On this basis, the Eighth Circuit vacated FCC Rules 315(c)-(f), and on rehearing vacated Rule 315(b). *Id.* This Court, however, held the opposite.

In *Iowa Utilities Board*, this Court disagreed with the Eighth Circuit and held that 47 U.S.C. § 251(c)(3) was

ambiguous and that the FCC's interpretation of that statute as requiring bundled, rather than unbundled, access to network elements was reasonable. 525 U.S. at 395. Under this Court's interpretation, the 1996 Act "does not say, or even remotely imply, that the elements must be provided only in this fashion and never in combined form." *Id.* at 394. US West argues that this Court's decision reversing the Eighth Circuit's decision to vacate Rule 51.315(b) was limited to its consideration of the discriminatory effects of permitting an incumbent carrier to disconnect previously connected network elements. *See* Pet. at 20-21. As stated above, this Court's interpretation of 47 U.S.C. § 251(c)(3) clearly extends beyond that narrow inquiry.

Rather than adhere to the Eighth Circuit's interpretation of 47 U.S.C. § 251(c)(3), the Ninth Circuit read the statute in light of the Supreme Court's determination that it does not preclude incumbent carriers from agreeing to provide network elements in combined form. 193 F.3d at 1121; Pet. App. 12a-14a.[17] As it should, the Ninth Circuit considered itself bound by this Court's interpretation of the Act.

> "The Supreme Court opinion . . . undermined the Eighth Circuit's rationale for invalidating [47 C.F.R. § 51.315(c)-(f)]. Although the Supreme Court did not directly review Eighth Circuit's invalidation of [47 C.F.R.] § 51.315(c)-(f), its interpretation of 47 U.S.C. § 251(c)(3) demonstrates that the Eighth Circuit erred when it concluded that the regulation was inconsistent with the Act. *We must follow the Supreme Court's reading of the Act*

[17]Recently, the Ninth Circuit affirmed the WUTC's decision to require US West to combine elements for competitive carriers in the context of an arbitration. *MCI Telecommunications Corp. v. US West Communications, Inc.*, 204 F.3d 1262 (9th Cir. 2000). US West's Petition for Rehearing and Petition for Rehearing En Banc in that case was denied on May 8, 2000.

> *despite the Eighth Circuit's invalidation of the nearly identical FCC regulation.*" 193 F.3d at 1121 (emphasis added); Pet. App. 14a.

Accordingly, the Ninth Circuit properly disregarded the Eighth Circuit's interpretation of the Act. *See, e.g., County of Los Angeles v. Davis*, 440 U.S. 625, 634 n.6 (1979) (a Supreme Court decision vacating a judgment of the Court of Appeals deprives that court's opinion of precedential effect). In a later decision, the Ninth Circuit restated this point:

> "The Eighth Circuit's decision to vacate the FCC regulation certainly still stands, and is immune under the Hobbs Act from collateral attack. . . . All this means for the purposes of the present appeal is that the Act does not currently mandate a provision requiring combination. Our task is to determine whether such a provision 'meets the requirements' of the Act, i.e., to decide whether a provision requiring combination violates the Act. The Supreme Court's interpretation of the Act makes it absolutely clear that it does not, and we have already so held." *MCI Telecommunications Corp. v. US West Communications*, 204 F.3d 1262, 1268 (9th Cir. 2000) (citations omitted).

In this case, the Ninth Circuit simply interpreted the Act as permitting the interconnection agreement provision in which US West agreed to combine network elements on behalf of MFS. Because the Ninth Circuit correctly interpreted the 1996 Act, this Court should deny the Petition.

IV. The Combination Provision Was Negotiated By US West and MFS. Therefore, Federal Court Review Should Be Minimal

US West glosses over the fact that the combination provision at issue in this case was a negotiated provision, not

one imposed on the parties by the arbitrator.[18] As a negotiated provision, the WUTC had very limited authority to reject it. *See* 47 U.S.C. § 252(e)(2)(A). Likewise, the 1996 Act does not contemplate extensive federal court review of negotiated agreements or provisions.

Under the 1996 Act, parties may seek federal court review of state commission arbitration decisions. "In any case in which a State commission makes a *determination* under this section [47 U.S.C. § 252], any party aggrieved by such *determination* may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 and this section." 47 U.S.C. § 252(e)(6) (emphasis added). By providing for federal court review of state commission determinations, Congress intended that the federal courts review arbitrated provisions, not negotiated provisions, for consistency with 47 U.S.C. §§ 251 and 252.

This intent is also evidenced by the language Congress chose to establish the two levels of review of arbitrated agreements and provisions. In defining the inquiry federal courts must make in reviewing state commission determinations, Congress chose language that is nearly identical to the language that defines the inquiry state commissions must use in considering whether to reject arbitrated agreements or provisions. *Compare* 47 U.S.C. § 252(e)(6) *with* 47 U.S.C. § 252(e)(2)(B).

The WUTC was authorized to reject the combination provision only if it discriminated against another carrier not a party to the agreement or if it was not consistent with the public interest, convenience, and necessity. *See* 47 U.S.C. § 252(e)(2)(A).[19] Therefore, the federal court had the

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[18]The district court alluded to the fact that the combination provision was negotiated when it held that the Eighth Circuit was concerned with "compelled recombination." Pet. App. 29a.

[19]In fact, state commissions may approve negotiated agreements or provisions that do not conform to the FCC rules or 47 U.S.C. §§ 251 and 252, so

authority to overturn this provision only if it determined that the WUTC was arbitrary and capricious in failing to determine that the provision was not in the public interest. *See* 193 F.3d at 1117 (establishing the arbitrary and capricious standard as the standard of review for the discretionary decisions of state commissions); Pet. App. 5a.

Congress contemplated that incumbents and competitors would agree on the terms and conditions for competitive access to the incumbent's network. *See* 47 U.S.C. §§ 251(c)(1), 252(a), (b). Like the state commissions, the federal courts should not be in a position to second guess the agreements or provisions that are negotiated between incumbents and competitors regarding access to the incumbent's network. This fact provides a fundamental reason for denying US West's Petition.

V. There Are Other Grounds for Affirming the Ninth Circuit and Denying the Petition

There are at least three additional grounds for denying this Petition.

First, even assuming the invalidity of the FCC's mandatory combination rule, the Ninth Circuit's decision may be affirmed on the rationale of the district court. That court upheld the provision by distinguishing the Eighth Circuit's decision, which the district court viewed as simply holding that the FCC rule requiring combination in all cases went beyond the scope of the 1996 Act. Pet. App. 28a-29a. The district court recognized that the only significant difference between access to unbundled network elements and access to retail or finished services is in how they are priced. *Id.* at 29a. The Eighth Circuit was concerned with pricing distinctions and did not hold that the Act prohibits state commissions from approving agreements that contain a provision whereby the incumbent agrees to combine

---

long as the agreement or provision does not result in discrimination against another carrier or violate the public interest, convenience, and necessity.

elements for a fee. In effect, US West here seeks to turn a court ruling that invalidates a rule requiring combination in all cases to a statutory requirement forbidding any incumbent from combining elements for a fee. The 1996 Act cannot be so read. Such a reading would be inconsistent with this Court's decision in *Iowa Utilities Board* and would unduly burden the discretionary authority of state commissions under the 1996 Act.

Second, the arbitration may be affirmed on the basis that the combination provision may be imposed as a matter of state law. The 1996 Act contemplates that state commissions may impose requirements that are a function of state law in their review and approval of interconnection agreements. *See* 47 U.S.C. § 251(d)(3) (state commissions may establish access and interconnection obligations of telecommunications companies that are consistent with the requirements of Section 251 and do not substantially prevent the implementation of Section 251 and the purposes of the Act); 47 U.S.C. § 252(e)(3) (state commissions may establish or enforce state law requirements when reviewing interconnection agreements). A state commission's decision to order an incumbent to combine network elements for a competitor would not be preempted by the 1996 Act because it would not conflict with the pro-competitive policies of the Act or any of its provisions. *See English v. General Elec. Co.*, 496 U.S. 72, 78-79 (1990). In addition, by granting states the authority to apply and enforce state law in their approval of agreements, Congress clearly did not preempt the field of local telecommunications regulation. *Id.* at 79.

In other cases, the WUTC has imposed a combination requirement on incumbent companies as a matter of state law in the course of an arbitration.[20] While the arbitrator in this

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[20] *In the Matter of the Petition for Arbitration of an Interconnection Agreement Between AT&T Communications of the Pacific Northwest, Inc. and GTE Northwest Incorporated Pursuant to 47 U.S.C. Section 252*, WUTC Docket No. UT-960307, 1998 WL 223213 (WUTC March 16, 1998).

case did not impose a combination requirement on US West (US West agreed to it), the fact that state commissions may impose such a requirement under state law is a basis for this Court to deny the Petition.

Third, to the extent US West is unsatisfied with the mandatory combination provision in the agreement, it need not resort to this Court. US West may renegotiate its agreement with MFS at any time. The agreement took effect on January 8, 1997, and was to remain in effect for a period of two and one-half years, and thereafter until the parties reached a new agreement. App. 3a. The parties were to commence negotiations on a new agreement within two years of the effective date of the agreement. *Id.* If US West is displeased with a term that it agreed to in the past, it should renegotiate the agreement rather than ask this Court to undo it.

CONCLUSION

For the foregoing reasons, we request that this Court deny US West's Petition for a Writ of Certiorari.

June 2, 2000

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APPENDIX

APPENDIX A

MFS INTELENET, INC.

AND

U S WEST COMMUNICATIONS, INC.

ARBITRATED INTERCONNECTION AGREEMENT

FOR THE STATE OF WASHINGTON

XXXI. UNBUNDLED ACCESS/ELEMENTS

A. General Terms

1. USWC Agrees to provide the following unbundled network elements which are addressed in more detail in later sections of this agreement: 1) local loop, 2) local and tandem switches (including all vertical switching features provided by such switches, 3) interoffice transmission facilities, 4) network interface devices, 5) signaling and call-related database facilities, 6) operations support systems functions, and 7) operator and directory assistance facilities.

2. (deleted)[9]

3. USWC will not restrict the types of telecommunications services MFS may offer through unbundled elements, nor will it restrict MFS from combining elements with any technically compatible equipment the MFS owns. USWC will provide MFS with all of the functionalities of a

[9]The proposed USWC paragraph has been deleted pursuant to the Arbitrator's Decision in Docket UT-960323.

particular element, so that MFS can provide any telecommunications services that can be offered by means of the element. USWC agrees to perform and MFS agrees to pay for the functions necessary to combine requested elements in any technically feasible manner either with other elements from USWC's network, or with elements possessed by MFS. However, USWC need not combine network elements in any manner requested if not technically feasible, but must combine elements ordinarily combined in its network in the manner they are typically combined.

. . . .

XXXIV. MISCELLANEOUS TERMS

A. General Provisions

. . . .

V. Term of Agreement

This Agreement shall be effective for a period of 2 ½ years, and thereafter the Agreement shall continue in force and

effect unless and until a new agreement, addressing all of the terms of this Agreement, becomes effective between the Parties. The Parties agree to commence negotations on a new agreement no later than two years after this Agreement becomes effective.

. . . .

APPENDIX B

[Filed 10-2-96]

OCTOBER 2, 1996

JOINT POSITION STATEMENT OF

MFS INTELENET, INC.

AND

U S WEST COMMUNICATIONS, INC.

ON NEGOTIATED TERMS
TO BE INCLUDED IN AN
ARBITRATED INTERCONNECTION
AGREEMENT

FOR THE STATE OF WASHINGTON

MFS Intelenet, Inc. ("MFS") and U S WEST Communications, Inc. ("USWC") have reached agreement on a substantial number of issues. The following draft agreement represents those areas of agreement between the parties. In those areas where no agreement has been reached, the draft Agreement provides language that describes the USWC and MFS positions on the disputed issues. Such language is identified by bold characters with a shaded background. The areas where no agreement has been reached shall be resolved through the ongoing arbitration proceedings.

Dated: October 2, 1996

_____ _____

Counsel for USWC Counsel for MFS

XXXI. UNBUNDLED ACCESS/ELEMENTS

A. General Terms

1. USWC agrees to provide the following unbundled network elements which are addressed in more detail in later sections of this agreement: 1) local loop, 2) local and tandem switches (including all vertical switching features provided by such switches, 3) interoffice transmission facilities, 4) network interface devices, 5) signing and call-related database facilities, 6) operations support systems functions, and 7) operator and directory assistance facilities.

USWC Proposed Paragraph:

2. This Agreement provides for the provision of unbundled loops to MFS which may be connected with MFS's switch for the purpose of offering a finished retail service. In addition, USWC agrees to provide an Unbundled Switching Element to MFS pursuant to the NIUER Process which may be combined with MFS-provided loops to provide a finished retail service. USWC will

not combine USWC's Unbundled Loops with USWC's Unbundled Switching Element to provide a finished service to MFS. USWC agrees, however, to offer finished retail services to MFS for resale pursuant to Section XXX, Resale, of this Agreement.

MFS opposes the inclusion of the above paragraph in this Agreement

3. USWC will not restrict the types of telecommunications services MFS may offer through unbundled elements, nor will it restrict MFS from combining elements with any technically compatible equipment the MFS owns. USWC will provide MFS with all of the functionalities of a particular element, so that MFS can provide any telecommunications services that can be offered by means of the element. USWC agrees to perform and MFS agrees to pay for the functions necessary to combine requested elements in any technically feasible manner either with other elements from USWC's network, or with elements possessed by MFS. However, USWC need not combine

network elements in any manner requested if not technically feasible, but must combine elements ordinarily combined in its network in the manner they are typically combined.

. . . .

APPENDIX C

[Filed 10-8-96]

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the matter of	)	
	)	
MFS COMMUNICATONS COMPANY, INC.'s	)	DOCKET NO.
	)	UT-960323
Petition for Arbitration Pursuant to 47 U.S.C. § 252(b) of Interconnection Rates, Terms, and Conditions with U S WEST Communications, Inc.	)	

U S WEST'S POST-ARBITRATION BRIEF

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INTRODUCTION

This Arbitration between U S WEST Communications, Inc. ("U S WEST") and MFS Communications Company, Inc. ("MFS") pursuant to the 1996 Federal Telecommunications Act ("the Act") represents far more than a simple arbitration of a dispute between two private parties. As issue is whether contractual terms and prices can be adopted which facilitate telecommunications competition in this state while also allowing for the continued attraction of private capital for constructing and maintaining the telecommunications infrastructure which serves all customers and all telecommunications providers in Washington.

The parties have worked diligently, even during the course of the arbitration proceedings, to reach a mutually satisfactory agreement on complex matters. The agreement is well over 100 pages long, including attachments and appendices, and resolves many of the issues between the parties. The agreement falls short, however, in several significant respects of being a complete agreement between the parties. In each case where a dispute remains for resolution by the arbitrator, the agreement has the proposed language or position of each party, allowing the arbitrator to simply decide each issue and conclude with a complete agreement.

Thus, the Arbitrator is left to resolve six issues.[1] First, the Arbitrator must determine what rate to set for

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[1]MFS' allegations of bad faith, made in its petition and raised again in Mr. Artman's testimony, are without merit. MFS appears to allege bad faith on three bases: that U S WEST asked MFS to sign a nondisclosure agreement; that U S WEST did not produce aprice list when MFS demanded one during negotiations and, apparently, that non agreement has yet been reached. With regard to the nondisclosure agreement, U S WEST addressed this issue in its response to MFS' petition, filed July 19, 1996. U S WEST believes that its response fully addresses this issue, and simply re-emphasizes ther that negotiations were

unbundled loops and whether the Arbitrator should establish geographically deaveraged prices for such loops. Second, the Arbitrator must determine what services may be purchased from U S WEST at wholesale prices and resold by MFS and the wholesale prices for such services. Third, the Arbitrator must determine whether to adopt the erroneous interpretation of the Act put forward in the FCC Orders and permit sham unbundling which will significantly erode the development of facilities-based competition and undercut the role of legitimate resale. Fourth, the Arbitrator must determine the levels of reciprocal compensation paid by U S WEST and MFS. The issue to be resolved is whether MFS should be permitted to charge tandem rates for use of its non-tendem switch. Fifth, the Arbitrator must decide whether U S WEST will be permitted to charge MFS cash in advance for special construction for any facilities U S WEST must construct

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never conditioned upon the execution of such an agreement. With regard to the price list issue, U S WEST responds that a price list was provided to MFS as soon as one was developed which reflected prices in accordance with the FCC methodology. There is no evidence of bad faith here, particularly since the parties were negotiating during this time. Mr. Artman exprssed frustraion at the negotiating process, suggesting that the parties' failure to reach an agreement on all issues somehow evidences bad faith by U S WEST. This is absurd. Of course, the parties did not reach an agreement – that is why this arbitration is taking place. Nonetheless, the parties have agreed on many, many terms, and failure to agree on all terms is not evidnece of bad faith. Finally, there seems to be some suggestion by MFS that simply because MFS is not interconnection and operating in Washington, this evidences bad faith. Of course, nothing could be further from the truth. Other carriers such as ELI and TCG have been interconnected and operating in Washington for years. MFS was a party to the interconnection proceedings (Docket Nos. UT-941464, et al.) and MFS chose, as a tactical matter, to wait to request interconnection until after the Act was signed, and to seek a negotiated/arbitrated agreement. This was clearly MFS' choice, but not its only choice. MFS could have, like other carriers in Washington, interconnected with U S WEST years ago.

specifically to serve MFS. Lastly, the Arbitrator must decide two issues associated with the provision of interim number portability. These are the issues of cost recovery and the treatment of switched access charges.

Before discussing these key issues and any of the other unresolved issues, U S WEST will address MFS' argument that the Arbitrator must follow the FCC Order even when provisions of that Order are contrary to the Act, the laws of Washington or the rules of this Commission.

The threashold issue to be addressed in this arbitration is whether the state of Washington is, as a matter of state policy, going to exercise its independent regulatory jurisdiction in interpreting the Federal Act, while also meeting its statutory regulatory duties in this state, or rigidly adhere to the FCC's *ultra vires* interpretation of the Act.[2] The issues in this case must be addressed by the Arbitrator and by the Commission as a matter of state policy consistent with a sovereign state's independent authority to exercise its rights and responsibilities under both federal and state law.

In deed, certain of the FCC's rules, if adopted by the Arbitrator of this Commission and not reversed on appeal, will so damage U S WEST's ability to attract capital that the public switched network in this state will deteriorate irreparably in a very short period of time. Accordingly, U S WEST asks the Arbitrator to rule in the following manner as to the issues before him: (1) The Arbitrator should reject the FCC's proxy prices. The FCC's proxy

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[2]The FCC's order is currently stayed by order of the Eighth Circuit Court of Appeals. Thus, the FCC's Order and Rules have no force and effect. If the stay remains in effect pending appeal, this arbitration may be resolved under the terms of the Act, without regard to the FCC's Order. If the FCC's Order and rules are not stayed pending appeal, this brief discusses how the arbitrator and Commission should proceed.

prices do not leave U S WEST with a viable business plan. Instead, the FCC's proxy prices are a prescription for arbitrage of artificial rate differences masquerading as competition. Unlike true facilities-based competition, this arbitrage will create no new services, o true customer choice, no new investment, no new jobs (other than telemarketing jobs) – in short it will create none of the public benefits intended by Congress in passing the Act; (2) The Arbitrator should not allow new entrants to obtain services or unbundled elements below cost. If MFS is granted the ability to obtain services or unbundled network elements below cost, all other providers will have that ability; (3) The Arbitrator should prohibit sham unbundling. If MFS is allowed to arbitrage cost/price relationships in U S WEST's current rate structure through "sham unbundling" – without allowing for retail rebalancing and deaveraging, such that it is allowed to pocket subsidies which have heretofore gone to support residential and rural service – then all competitors will have that right. Ultimately, if all competitors are able to ride on U S WEST's network at below cost rates and arbitrage U S WEST's current price structure, then not only will U S WEST not be able to attract investment capital to invest in Washington's telecommunications infrastructure, neither will facilities-based new entrants. The Commission should not so readily ignore the obvious implications of the FCC's orders.

If adherence to the FCC's order accelerates massive retail price rebalancing and retail deaveraging or if it has a catastrophic effect on network investment in this state, then this Commission, not the FCC, will be left to deal with the consequences.

I. The Arbitrator Should Not Follow The FCC Orders Where The Orders Are Contrary To The Act Or Usurp The Jurisdiction Of This Commission

Fundamental to our system of justice is the notion that no one has an obligation to comply with an unlawful regulation or statute.[3] An arbitrator who believes that provisions of the FCC Orders are unlawful, either as contrary to the Act or in excess of the FCC's jurisdiction, may ignore them on the ground that they are *ultra vires* and instead, adopt rules inconsistent with the FCC Orders but consistent with federal law. *See Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 374 (1986) (FCC regulations preempting state depreciation regulations are *ultra vires*).

The language that confers appellate jurisdiction upon federal district courts over the decisions of the state Arbitrator under § 252(e)(6) of the Act confirms this general rule. That section provide that any party aggrieved by the arbitration process may bring an action in federal district court " to determine whether the agreement or statement meets the requirements of *section 251 and this section*." (emphasis added.) This provision on its face clearly requires the federal courts to determine *not* whether the arbitrator's decision is in harmony with the FCC rules, but whether it abides by the Act.

It is clear, therefore, based on the appellate standard contained in the Act, that the Arbitrator is required to resolve issues in these arbitrations in compliance with the Act. If the Arbitrator concludes that provisions of the FCC Orders are inconsistent with the Act or exceed the jurisdiction of the FCC and constitute an impermissible infringement on the

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[3]This is in marked contrast to the obligation to abide by an unlawful injunction. *See e.g., Walker v. City of Birmingham*, 388 U.S. 307 (1967).

authority of the Commission over intrastate matters, the Arbitrator may adopt the contractual provision that best meets the requirements of the Act or that best vindicates the policies of this State with respect to intrastate telecommunications issues. The Arbitrator's obligation is one of fidelity to the Act and not to the FCC Order.

Finally, the Arbitrator has an obligation to protect the public interest. Absent clear federal preemption, if what U S WEST is requesting is consistent with the Federal Act, and not contrary to state law, the Commission can consider and rule on the issues. MFS' sole rationale for its stated position in many instances is that the FCC rules require a certain result. If the FCC rule supporting MFS' position is unlawful, then MFS has no valid rationale for its position. And if a rule relied on by MFS is not unlawful, but rather subject to interpretation, in interpreting the rule, the Arbitrator should reject MFS' position and should adopt U S WEST's position if U S WEST's position is consistent with the public policy interests of Washington.

. . . .

No. 99-1641

IN THE

Supreme Court of the United States

U S WEST COMMUNICATIONS, INC.,
Petitioner,

v.

MFS INTELENET, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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June 2, 2000

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RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondent MCI WORLDCOM Communications, Inc. (formerly MFS Intelenet, Inc.) states as follows:

MCI WORLDCOM Communications, Inc., is a wholly owned subsidiary of MCI WORLDCOM Network Services, Inc., which is a wholly owned subsidiary of MCI Communications Corporation which, in turn, is a wholly owned subsidiary of WorldCom, Inc. WorldCom, Inc., through its wholly owned subsidiaries, provides local and long-distance telecommunications services domestically and internationally.

WorldCom, Inc is a publicly traded company on the Nasdaq National Market under the symbol "WCOM". No publicly held company owns 10 percent or more of WorldCom stock.

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No. 99-1641

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BRIEF IN OPPOSITION

Respondent MCI WORLDCOM Communications, Inc. (formerly known as MFS Intelenet, Inc. ("MFS")),[1] submits this brief in opposition to the petition for a writ of certiorari filed by U S West Communications, Inc. ("U S West").

The petition should be denied for three reasons. First, this case would be an exceptionally poor vehicle for addressing the

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[1] MCI WORLDCOM Communications, Inc. is the successor-in-interest to MFS Intelenet, Inc. To be consistent with the terms used in the Ninth Circuit decision, however, we will continue to use the name "MFS".

issue U S West seeks to raise. The substantive provisions of § 251 of the Telecommunications Act of 1996 (the "1996 Act" or the "Act"),[2] and the implementing regulations of the Federal Communications Commission ("FCC" or "Commission") apply only to provisions imposed by state utility commissions after arbitration. They do not apply to privately negotiated provisions. The provision at issue in this case was negotiated, and thus not governed by the regulations that U S West claims the Ninth Circuit impermissibly passed upon. Thus, this case does not present the question U S West has raised in its petition. At a minimum, this Court could not reach the question U S West presents until it first resolved the entirely fact-bound question whether the provisions at issue here were imposed by arbitration or privately negotiated. That is reason enough to deny the petition.

Second, the Circuit split alleged by U S West is entirely contrived. The Fourth Circuit's decision in *GTE South, Inc. v. Morrison*, 199 F.3d 733 (4th Cir. 1999), involved an arbitrated rate provision, the lawfulness of which was governed by binding FCC regulations. In rejecting GTE's challenge to the rates, the Fourth Circuit declined to review the substance of those regulations, citing the Ninth Circuit's opinion *in this very case* for the proposition that the Hobbs Act bars a "collateral[] attack [on] the FCC's [orders]," when a binding regulation is in effect. *See* Pet. App. 17a. Thus, the Fourth and Ninth Circuits are in complete accord on the proper application of the Hobbs Act – in those circumstances where the Hobbs Act is relevant.

Third, even if the challenged provision had been arbitrated, review would not be warranted. Because of the unique procedural posture of this case this issue is unlikely to arise

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[2]Pub. L. No. 104-104, 110 Stat. 56 (codified in pertinent part at 47 U.S.C. §§ 251 *et seq.*).

again. More fundamentally, the actions of the Ninth Circuit in this unusual circumstance do not violate the Hobbs Act. The Ninth Circuit did not purport to pass upon the validity of the FCC rules that are presently before the Eighth Circuit in a Hobbs Act case. Thus, the decision in no way usurps the Eighth Circuit's authority. Instead, because the FCC rules at issue were not in effect at the time the Ninth Circuit ruled, the court simply determined whether the agreement met "the requirements of section 251" and section 252 of the Act itself. 47 U.S.C. § 252(e)(6). Nothing in that decision implicates the Hobbs Act, which does not prohibit other Circuits from interpreting and applying the Act itself.

STATEMENT OF THE CASE

A. The 1996 Act

1. The Act's Leasing Provisions and the FCC's Combinations Rules

Congress enacted the 1996 Act to end the "longstanding regime of state-sanctioned monopolies" that has prevailed in markets for local telephone service across the country for almost a century, *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 371 (1999) ("*AT&T* "), and to replace it with a vibrant competitive market that will bring lower prices and better service to consumers "as quickly as possible." H.R. Rep. No. 104-204, at 89 (1995) ("H. Rep."). Because local telephone markets were traditionally controlled by incumbent monopolists like U S West – which own nearly all of the facilities necessary to provide local phone service – the Act imposes a number of duties upon incumbent carriers to ensure the advent of competition in the local telephone market. As this Court recognized, "[f]oremost among these duties is the LEC's obligation under 47 U.S.C. § 251(c) . . . to share its network

with competitors." *AT&T*, 525 U.S. at 371. The Act thus authorizes new entrants such as MFS to provide local telecommunications service using leased elements of an incumbent carrier's existing network. *See* 47 U.S.C. § 251(c)(3).[3]

To facilitate entry of new competitors into the local market, § 251(c)(3) of the Act requires an incumbent carrier to provide access to its network elements "in a manner that allows requesting carriers to combine such elements in order to provide telecommunications service." *Id.* Pursuant to its statutory obligation to implement the terms of the 1996 Act, the FCC concluded that this language requires incumbent carriers to provide unbundled network elements in combined form. *See* 47 C.F.R. § 51.315; *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 F.C.C.R. 15499, ¶¶ 293-297 (1996) ("Local Competition Order"). FCC Rule 315(b) thus mandates that incumbent carriers lease combinations of unbundled elements that exist in the incumbent's network, and subsections (c) through (f) of the Rule require incumbents to combine previously separate elements for a requesting new entrant, and to combine the incumbent's elements with those of the new entrant.

Upon its release in August 1996, the Local Competition Order was subject to numerous Hobbs Act challenges. These challenges were consolidated for review in the Eighth Circuit,

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[3]In addition to the leasing provisions, the Act establishes two other routes for new entrants to enter local markets. First, a new entrant can "interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers." 47 U.S.C. § 251(a)(1). Second, a competing local carrier can purchase an incumbent's local telephone services at wholesale rates, under the Act's "resale" provisions. *See* 47 U.S.C. § 251(c)(4); § 252(d)(3).

which invalidated Rules 315(b)-(f). *See Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 813 (8th Cir. 1997), *rev'd in part and aff'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999). The Eighth Circuit concluded that the language in § 251(c)(3) stating that "[a]n incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service," 47 U.S.C. § 251(c)(3), "unambiguously indicates that requesting carriers will combine the unbundled elements themselves." *Iowa Utils. Bd.*, 120 F.3d at 813. Thus, the Eighth Circuit concluded, "unbundled" can only mean physically separated. *Id.*

This Court reversed the Eighth Circuit on that point, explicitly rejecting the Eighth Circuit's conclusion that § 251(c)(3) allows the leasing only of "discrete pieces" of network elements. *AT&T*, 525 U.S. at 393-95. The Court rejected the incumbents' argument that "unbundled" as used in § 251(c)(3) means physically separated into pieces, emphasizing that § 251(c)(3) "does not say, or even remotely imply, that elements must be provided only in this fashion and never in combined form." *AT&T*, 525 U.S. at 394. Because nothing in the Act itself precludes a requirement that incumbents lease network elements in combined form, and because the FCC's justification for imposing the combinations rule was reasonable, the Court upheld the FCC's requirement that incumbents provide access to existing combinations of network elements. *Id.* at 395.[4]

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[4]This Court also affirmed the FCC's "all elements" rule, which allows new entrants to provide a finished service via unbundled network elements. In doing so, this Court rejected the incumbents' argument that permitting new entrants to provide telecommunications services using combinations of network elements "eviscerates the distinction between resale and unbundled access" and "amounts to Government-sanctioned regulatory arbitrage." *AT&T*, 525 U.S. at 393-94.

Although it rejected the basis upon which the Eighth Circuit invalidated the FCC's combinations rules, this Court did not expressly rule on the validity of Rules 315(c)-(f). The Eighth Circuit is currently considering whether it should reinstate the remainder of Rule 315 in light of the Supreme Court's decision. *See* Pet. App. 114a.

2. Negotiation and Arbitration Under the Act

The Act establishes two different ways in which a new entrant and an incumbent carrier can reach an "interconnection agreement" – a contract that sets forth the terms and conditions under which the new entrant will have access to the incumbent's network.[5] The first is negotiation: under § 252(a)(1), a new entrant may request that the incumbent carrier engage in negotiations to determine the terms and conditions by which the new entrant will lease network elements. 47 U.S.C. § 252(a)(1). The only constraints on negotiated terms are: 1) the term must not discriminate against a carrier not party to the agreement, and 2) the term must be consistent with the public interest, convenience, and necessity. 47 U.S.C. § 252(a)(1); § 252(e)(2); *AT&T*, 525 U.S. at 372-73 (noting that an incumbent may "negotiate an agreement without regard to the duties it would otherwise have under § 251(b) or (c)") (footnote omitted).

The second method is through arbitration. After a fixed period of time, if the parties fail to agree on some or all of the terms and conditions of interconnection, they may submit the unresolved issues to a state utility commission for compulsory arbitration. 47 U.S.C. § 252(b)(1). Any arbitrated term must be

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[5]These procedural mechanisms apply equally to the Act's interconnection and resale provisions.

consistent with all applicable terms of the Act, and any binding FCC regulations. *See* 47 U.S.C. § 252(c)(1); § 252(e)(2)(B).

Once the arbitration is completed, the arbitrated terms are combined with the negotiated terms in a final agreement which is submitted to the state commission for approval. 47 U.S.C. § 252(e)(1). In reviewing the terms, the commission must determine whether each complies with the standards set out above -- that is, whether the arbitrated terms comply with the Act and the FCC's regulations, and whether the negotiated terms are non-discriminatory and consistent with the public interest. 47 U.S.C. § 252(e)(2)(A); § 252(e)(2)(B). The state commission's final determination is subject to review in federal district court, which is charged with making the same inquiry. *See* 47 U.S.C. § 252(e)(6).

B. Negotiation, Arbitration, and Review of the U S West/MFS Interconnection Agreement

The provision U S West now seeks to have invalidated is a *negotiated* provision, which states:

> USWC agrees to perform and MFS agrees to pay for the functions necessary to combine requested elements in any technically feasible manner either with other elements from USWC's network, or with elements possessed by MFS. However, USWC need not combine network elements in any manner requested if not technically feasible, but must combine elements ordinarily combined in its network in the manner they are typically combined.

Resp. App. 2a-3a (Joint Proposed Statement, at 73 (Arb. Record, Tab 40)). Because it was a negotiated provision, U S West did not present this provision to the WUTC for compulsory arbitration, and the arbitrator did not consider the

issue. In its January 8, 1997 order approving the final agreement, the WUTC approved this and other negotiated portions of the parties' interconnection agreement pursuant to § 252(e)(2)(A) of the Act, concluding that "[t]he negotiated provisions of the [agreement] do not discriminate against a telecommunications carrier not a party to the agreement and are consistent with the public interest, convenience, and necessity." *See* Pet. App. 37a.[6] No party challenged that finding.

U S West filed suit in federal district court pursuant to § 252(e)(6), challenging the WUTC's arbitration decisions on several grounds. Unsurprisingly, the complaint did not challenge the combinations provision to which U S West had voluntarily agreed. While that suit was pending, however, the Eighth Circuit vacated Rules 315(b)-(f); in response, U S West attempted to inject into the case a claim attacking the combinations provision. U S West conceded that it had agreed to the term, but also made the strained argument that it had only agreed to the combinations clause because it had submitted a provision to the WUTC for arbitration that would have prevented new entrants from purchasing enough elements in combination to provide a finished service.[7] Had U S West

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[6]The WUTC's order actually states that "[t]he negotiated provisions of the Act . . . are consistent with the public interest, convenience, and necessity." *See* Pet. App. 37a. It is clear from the context of the order, however, that this is a typographical error, and that the WUTC meant "Agreement."

[7]The arbitrated provision to which U S West referred stated in its entirety:

> This Agreement provides for the provision of Unbundled Loops to MFS which may be connected with MFS's switch for the purpose of offering a finished retail service. In addition, USWC agrees to provide an Unbundled Switching Element to MFS pursuant to the NIUER Process which may be combined with MFS-provided loops to

expected to lose the arbitrated issue, it argued, it would not have voluntarily agreed to the combinations provision. U S West offered no support for its novel theory that a strategic miscalculation converts a negotiated term into an arbitrated one.[8]

On review of the WUTC's decision approving the interconnection agreement, the district court denied all of U S West's claims, including its newly-minted challenge to the combinations provision. Pet. App. 28a. The Ninth Circuit affirmed, rejecting U S West's argument that the Eighth Circuit's holding required striking the combinations provision. Pet. App. 13a - 14a.[9] In so ruling, the Ninth Circuit noted that

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> provide a finished retail service. USWC will not combine USWC's Unbundled Loops with USWC's Unbundled Switching Element to provide a finished service to MFS. USWC agrees, however, to offer finished retail services to MFS for resale pursuant to Section XXX, Resale, of this Agreement.

Resp. App. 2a.

[8]The provision that U S West did submit for arbitration stated, among other things, that: "USWC will not combine USWC's Unbundled Loops with USWC's Unbundled Switching Element to provide a finished service to MFS." Resp. App. 2a. U S West argued that this provision was necessary to prevent MFS from providing a finished service using combined leased network elements. But this Court has squarely rejected that argument. *AT&T*, 525 U.S. at 393-94. In any event, at no time during the arbitration process did U S West condition its voluntary agreement to combine network elements on the WUTC's approval of the language in the arbitrated provision. Indeed, the record makes clear that it was only after the Eighth Circuit invalidated the FCC's rules that U S West concluded the two provisions were linked.

[9]Before the Ninth Circuit, MFS expressly defended the combinations provision on the ground that it was negotiated, noting that U S West's attempt to bootstrap its challenge to the combinations provision into its "finished services" argument "is a red herring, meant to distract the Court

this Court had rejected the grounds upon which the Eighth Circuit invalidated the FCC's combinations rules – namely, that § 251(c)(3) mandates that network elements be leased only on a separate basis. Pet. App. 12a-13a. Accordingly, the court of appeals upheld the parties' negotiated provision. Pet. App. 13a-14a.

REASONS FOR DENYING THE WRIT

I. BECAUSE THE CHALLENGED PROVISION WAS NEGOTIATED, THE HOBBS ACT IS NOT IMPLICATED.

U S West's petition necessarily depends on the premise that the combinations provision which it challenges was an arbitrated provision. That is because only arbitrated provisions must meet the requirements of § 251(c) of the Act and of the FCC's implementing regulations. Negotiated provisions, in contrast, must be consistent only with narrow, delineated statutory requirements, and need not be consistent with the FCC's regulations. Thus, if the combinations provision is negotiated, the FCC's regulations are irrelevant, as is the fact that those regulations are currently under review at the Eighth Circuit. Rather than raising any issue regarding the Hobbs Act, this case would instead require this Court first to determine whether, as a factual matter, the combinations provision was negotiated. If it was negotiated, then the decision below would have to be affirmed because a negotiated provision approved by a state commission pursuant to § 252(e)(2)(A) of the Act is

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from USWC's voluntary agreement to a negotiated provision that it now wishes it had not negotiated." Resp. App. 7a (MFS Opp. Br. at 37); *see also* Resp. App. 5a (MFS Opp. Br. at 35) (arguing that "nothing prevents an [incumbent] from voluntarily agreeing to combine elements for a requesting carrier").

enforceable without reference to § 251(c)(3) or Rules 315(c)-(f). *See* 47 U.S.C. § 252(e)(2)(A). No party has contended that the WUTC's approval of the agreement's negotiated provisions pursuant to § 252(e)(2)(A) was improper.

Presumably for this reason, U S West's petition attempts to suggest that the combinations provision was arbitrated, asserting, for example, that the court below "was reviewing a WUTC *requirement* that was itself just an implementation of the FCC rules under consideration in the Eighth Circuit." Pet. at 10 (emphasis added); *see also* Pet. at 2, 7 (asserting that the provision was "imposed" by the state PUC). But that assertion is contrary to the record, which demonstrates that the WUTC *did not* "order" or "require" that the combinations provision be included in the interconnection agreement. Instead, U S West *agreed* to the provision during voluntary negotiations. *See* Resp. App. 2a. Indeed, U S West conceded as much in its briefing before the Ninth Circuit. There, U S West made clear that it "was willing at the time of the arbitration to combine some elements for MFS, if paid for this service." Resp. App. 10a (U S West Reply Brief at 9). This concession is dispositive; it is also unsurprising, given that the provision at issue states, clearly and unambiguously, that "U S West *agrees* to perform . . . the functions necessary to combine requested elements . . . ." Resp. App. 2a (emphasis added).

Because U S West agreed to the combinations provision, the WUTC did not even consider the question of whether the provision was consistent with § 251(c)(3) of the Act. Thus, U S West's statement that the WUTC "simply adher[ed]" to Rules 315(c)-(f) is untrue.[10] Indeed, the WUTC never even

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[10]Indeed, the Arbitrator's Report and Decision, which was adopted by the WUTC in its entirety, never mentioned Rules 315(c)-(f). *See* Pet. App. 55a-57a. The only FCC combinations rule to which the arbitrator referred

considered Rules 351(c)-(f); instead it approved this negotiated term under § 252(e)(2)(A), which establishes the standard for reviewing negotiated agreements, and held only that all negotiated terms (including this one), were non-discriminatory and consistent with the public interest. Pet. App. 37a.

To be sure, after the WUTC's decision was appealed, U S West attempted to avoid the import of its agreement by arguing that it was not a true agreement: it was "willing" to perform combinations, U S West asserted, only because it had hoped that the arbitrator would rule in its favor on another provision and prohibit MFS from using combined elements to "obtain[] finished services at cost-based rates rather than resale prices." Resp. App. 10a (U S West Reply Brief at 9). But U S West's miscalculation hardly turns the voluntarily negotiated combinations provision into an arbitrated one.[11]

In short, U S West has twice tried and twice failed to convince a court to allow it to avoid the obligation it voluntarily assumed. Having failed in that effort, U S West now attempts

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in rendering his decision on U S West's "finished service" argument was Rule 315(a), which merely restates the requirement of § 251(c)(3) that: "[a]n incumbent LEC shall provide unbundled network elements in a manner that allows requesting telecommunications carriers to combine such network elements in order to provide a telecommunications service." 47 C.F.R. § 51.315(a).

[11]The court of appeals appeared to find that the provision would be lawful even if it had been arbitrated, concluding that "requiring U S West to combine unbundled network elements is not inconsistent with the Act . . . because the Act does not say or imply that network elements may only be leased in discrete parts." Pet. App. 13a. Presumably because it concluded that the provision met even this higher standard, the court did not discuss whether or not the combinations provision was negotiated. If this Court were to accept review, however, it would first have to determine whether the provision was negotiated and, if so, affirm on that basis.

to evade its agreement by transforming this case into a full blown dispute about the applicability of the Hobbs Act. Because this case involves a negotiated provision, however, it does not present that issue, and U S West's attempt to bootstrap it into this case fails.

II. BECAUSE THE NINTH CIRCUIT AND THE FOURTH CIRCUIT CONSISTENTLY APPLIED THE HOBBS ACT, THERE IS NO CIRCUIT SPLIT ON THIS ISSUE.

U S West's claim that a split exists between the Ninth and the Fourth Circuits (Pet. at 14-15) is baseless. Indeed, in the very case that U S West asserts creates a split, the Fourth Circuit *relied* on the very case under review here. That case, *GTE South, Inc. v. Morrison* involved a state utility commission's application of the FCC's pricing rules to disputed issues submitted by the parties for arbitration. 199 F.3d at 738-39. A challenge to the rules was pending before the Eighth Circuit on remand from the Supreme Court. Accordingly, at the time the Fourth Circuit reviewed the agreement, the FCC's pricing rules were in effect and binding. The Fourth Circuit correctly rejected GTE's argument that the court should independently review and invalidate those rules, holding that "a party cannot use an appeal from a district court to circumvent the Hobbs Act's requirement that a challenge to an FCC order is subject only to direct review in a court of appeals." *Id.* at 743.

In so holding, the Fourth Circuit cited the Ninth Circuit's decision in this case in support of its ruling that the Hobbs Act precludes a collateral attack on the FCC's order. *See id.* (citing *U S West v. MFS Intelenet*, 193 F.3d 1112, 1120, 1122-23 (9th Cir. 1999)). Specifically, the Fourth Circuit relied on the Ninth Circuit's decision refusing to independently evaluate FCC rules

in effect when it issued its decision. Although U S West had urged the Ninth Circuit to hold that the FCC's rules were inconsistent with the Act, the Ninth Circuit, relying on the Hobbs Act, expressly refused to do so, holding that "[t]he FCC order is not subject to collateral attack in this proceeding." Pet. App. 11a.

Nothing in the Fourth Circuit's decision conflicts with the Ninth Circuit's ruling. In those instances in which binding FCC rules were in effect at the time of its decision, the Ninth Circuit applied those rules despite *U S West's* argument that the Ninth Circuit should engage in *de novo* review of the FCC's regulations. *See* Pet. App. 11a, 16a-18a.[12] In those instances in which no FCC rule governed the question, the Ninth Circuit looked to the terms of the Act. The Ninth Circuit and the Fourth Circuit thus applied the Hobbs Act in precisely the same manner.

III. U S WEST'S PETITION IS BASED ON A FLAWED UNDERSTANDING OF THE HOBBS ACT.

Even if the provision at issue here had been arbitrated, and any existing FCC rules were relevant, the Ninth Circuit's decision would not warrant review. To begin with, the procedural setting of this case is highly idiosyncratic. The question U S West seeks to have addressed is whether, in the unique circumstances where the Supreme Court has dispositively interpreted the language of a statute in its review

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[12]U S West's present arguments are therefore at odds with the position it took before the Ninth Circuit. *See* Pet. App. 17a n.13 ("U S West argues that the Hobbs Act does not apply because section 252(e)(6) of the Act grants jurisdiction to federal district courts to determine whether the interconnection agreements comply with the Act and the FCC regulations. Section 252(e)(6) does not, however, grant jurisdiction to federal district courts to review the validity of FCC regulations.").

of an agency regulation, and the Hobbs Act court on remand is in the process of considering the impact of the Supreme Court's decision on a related regulation, another court of appeals is precluded from considering the Supreme Court's interpretation in assessing the meaning of the statute in a case not involving the regulations. U S West has not identified any case in which this issue has arisen before, and there is no reason to think it will ever arise again. Thus, there is no reason for this Court to grant review.

More fundamentally, the Ninth Circuit's decision does not usurp the Eighth Circuit's Hobbs Act jurisdiction because the Ninth Circuit did not purport to reinstate subsections (c) through (f). Because the Eighth Circuit's prior invalidation of those provisions was based on an interpretation of § 251(c)(3) that this Court has now rejected, several parties have asked the Eighth Circuit to reinstate subsections (c) through (f). That issue has been fully briefed and submitted to the Eighth Circuit. Nothing in the Ninth Circuit's decision limits the Eighth Circuit's ability to make up its own mind on reconsideration. Pet. App. 13a-14a. Accordingly, the Ninth Circuit's decision does not disturb the Eighth Circuit's exclusive authority to "enjoin[], set[] aside, or suspend[]" the FCC's rules. *See* 28 U.S.C. § 2349(a).

Even if the Ninth Circuit's understanding of the meaning of the Act differs from that the Eighth Circuit may announce in the pending remand proceedings, the Hobbs Act is not implicated. The Hobbs Act gives the courts of appeals exclusive jurisdiction to review all final orders of the FCC. *See* 28 U.S.C. § 2342(1); 47 U.S.C. § 402(a); *Wilson v. A.H. Belo Corp.*, 87 F.3d 393, 396-97 (9th Cir. 1996); *FCC v. ITT World Communications, Inc.*, 466 U.S. 463, 468 (1984). As the court in which the direct appeals of the FCC's Local Competition Order and related rules have been consolidated, *see* 28 U.S.C.

§ 2112(a)(3), the Eighth Circuit is charged with assessing the validity of the FCC's regulations and entering any order "enjoining, setting aside, or suspending, in whole or in part," the agency's rules. 28 U.S.C. § 2349(a). No court has ever construed this language to mean that, if a Hobbs Act court happens to engage in statutory construction in the process of "determin[ing] the validity of" a Commission order, it thereby gains exclusive power to construe the underlying statute.[13]

To be sure, the Hobbs Act precludes a collateral proceeding that seeks to enjoin, set aside, suspend, or adjudicate the validity of FCC rules outside the "appropriate procedure for obtaining judicial review of the agency's disposition," which is in "the Court of Appeals as provided by statute." *ITT World Communications*, 466 U.S. at 468; *see also A.H. Belo*, 87 F.3d at 400. But the Ninth Circuit was not engaged in a collateral attack here, because it was not reviewing an FCC regulation.

It is for this reason that the cases on which US West relies are utterly inapposite. *See* Pet. at 12-13 (citing cases). Each of

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[13]The structure and legislative history of the Hobbs Act provide further confirmation that the Eighth Circuit's exclusive jurisdiction extends only to assessing the FCC's Local Competition Order, not to construing the statute behind it. The Hobbs Act is not structured to set up a quasi-Supreme Court with exclusive control over a particular area of federal law. Instead, it is designed to conserve judicial resources by ensuring that only one appellate court reviews the administrative record supporting the agency's decision and to guarantee that an agency order is not subject to continuous attack after a chosen court has evaluated its validity. *See, e.g.*, Sen. Rep. No. 81-2618, at 4-5 (1950); H.R. Rep. 81-2122, at 3-4 (1950); S. Rep. No. 85-2129, at 2-5 (1958). In keeping with this purpose, the bulk of the Hobbs Act is devoted to the appropriate treatment of the administrative record, the agency, and its order; it makes no mention of the reviewing court's power with regard to the underlying statute itself. *See, e.g.*, 28 U.S.C. §§ 2344, 2346, 2347; *see also* S. Rep. No. 81-2618, at 4-5 (1950); H.R. Rep. 81-2122, at 3-4 (1950).

these cases involves an effort to enjoin, or collaterally attack an *existing* agency order, something which the Ninth Circuit itself has expressly recognized is forbidden by the Hobbs Act. *See* Pet. App. 17a; *ITT World Communications, Inc.*, 466 U.S. at 468; *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 69 (1970); *A.H. Belo*, 87 F.3d at 399; *Air Transport Ass'n v. Public Utils. Comm'n*, 833 F.2d 200, 206 (9th Cir. 1987); *Brotherhood of Locomotive Eng'rs v. Boston & Maine Corp.*, 788 F.2d 794, 801 (1st Cir. 1986); *Yellow Forwarding Co. v. Atlantic Container Line*, 668 F.2d 350, 354 (8th Cir. 1981). These cases thus have nothing to do with a situation like the one presented here, in which an agency order has already been invalidated and a court is called on to determine, in the absence of an agency regulation, whether a challenged provision is consistent with the relevant statute itself.

Here, the Eighth Circuit previously exercised its exclusive power and "suspend[ed] . . . in part, the order of the agency." 28 U.S.C. § 2349. As a result of that decision, no relevant FCC rules are in place. Unless and until the Eighth Circuit reinstates the suspended rules, courts have returned to the world that existed *before* the FCC promulgated the challenged provisions. Each circuit must independently determine whether contractual terms comply with the Act in the absence of a binding FCC order on the subject. Thus, while no other circuit can reinstate Rules 315(c)-(f), they can certainly decide – as the Ninth Circuit did here – whether a similar contractual provision is consistent with the Act itself.

In sum, U S West's challenge depends on a fundamental misunderstanding of the scope of the collateral attack doctrine. The Hobbs Act and the principles underlying it merely prevent the Ninth Circuit from reinstating or relying on Rules 315(c)-(f) after they have been invalidated by the Eighth Circuit on direct

review, or from interfering with the Eighth Circuit's ability to decide the rules' validity on remand. Because the Ninth Circuit did not do so, there was no Hobbs Act violation.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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June 2, 2000

APPENDIX A

OCTOBER 2, 1996
JOINT POSITION STATEMENT OF

MFS INTELENET, INC.,

AND

US WEST COMMUNICATIONS, INC.

ON NEGOTIATED TERMS TO BE INCLUDED IN AN ARBITRATED INTERCONNECTION AGREEMENT

FOR THE STATE OF WASHINGTON

* * * *

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XXXI. UNBUNDLED ACCESS/ELEMENTS

A. General Terms

1. USWC agrees to provide the following unbundled network elements which are addressed in more detail in later sections of this agreement: 1) local loop, 2) local and tandem switches (including all vertical switching features provided by such switches), 3) interoffice transmission facilities, 4) network interface devices, 5) signaling and call-related database facilities, 6) operations support systems functions, and 7) operator and directory assistance facilities.

USWC Proposed Paragraph:

2. **This Agreement provides for the provision of Unbundled Loops to MFS which may be connected with MFS's switch for the purpose of offering a finished retail service. In addition, USWC agrees to provide an Unbundled Switching Element to MFS pursuant to the NIUER Process which may be combined with MFS-provided loops to provide a finished retail service. USWC will not combine USWC's Unbundled Loops with USWC's Unbundled Switching Element to provide a finished service to MFS. USWC agrees, however, to offer finished retail services to MFS for resale pursuant to Section XXX, Resale, of this Agreement.**

MFS opposes the inclusion of the above paragraph in this Agreement.

3. USWC will not restrict the types of telecommunications services MFS may offer through unbundled elements, nor will it restrict MFS from combining elements with any technically compatible equipment the MFS owns. USWC will provide MFS with all of the functionalities of a particular element, so that MFS can provide any telecommunications services that can be offered by means of the element. USWC agrees to perform and MFS agrees to pay for the functions necessary to combine requested elements in any technically feasible manner either with other elements from USWC's network, or with elements possessed by MFS. However, USWC need not combine network elements in any manner requested if not technically feasible, but must combine elements ordinarily combined in its network in the manner they are typically

combined.

B. Description of Unbundled Elements

1. Tandem Switching

USWC will provide a tandem switching element on an unbundled basis. The tandem switch element includes the facilities connecting the trunk distribution frames to the switch, and all the functions of the switch itself, including those facilities that establish a temporary transmission path between two other switches. The definition of the tandem switching

* * * *

APPENDIX B

98-35146

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

U S WEST COMMUNICATIONS, INC.,

Plaintiff/Appellant,

v.

MFS INTELENET, INC., et al.,

Defendants/Appellees.

On Appeal From United States District Court
for the Western District of Washington
No. C97-222WD

BRIEF OF APPELLEE MFS INTELENET, INC.

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C. *USWC's Statutory Obligations*

1. Combinations of network elements

Under Section 251(c)(3), a requesting carrier, such as MFS, may achieve the capability to provide telecommunications services completely through access to the unbundled network elements of an ILEC, such as USWC. *Iowa Utils. Bd.*, 120 F.3d at 814. Contrary to USWC's assertion (USWC Brief at 18), there is no mandate in the Act that requires CLECs to combine ILEC unbundled elements they purchase for themselves. While according to the Eighth Circuit's decision a state commission may not impose a rebundling obligation on an ILEC, 120 F.3d at 813, nothing prevents an ILEC from voluntarily agreeing to combine elements for a requesting carrier. In fact, the structure of the Act reveals Congress' preference for such voluntary agreement. *Id.* at 801. Thus a requesting carrier and an ILEC may mutally agree that the ILEC will combine unbundled network elements for the CLEC.

MFS and USWC negotiated numerous provisions in their interconnection agreement and requested that the WUTC arbitrate only certain issues that were not resolved by negotiation. R 1769, 1897-98; ER 24, 31-32. One such provision

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voluntarily agreed to by the parties is the following section

concerning the combination of network elements:

> USWC agrees to perform and *MFS agrees to pay for the functions necessary to combine requested elements* in any technically feasible manner either with other elements from USWC's network or with elements possessed by MFS. However, USWC need not combine network elements in any manner requested if not technically feasible, but must combine elements ordinarily combined in its network in the manner they are typically combined.

R 2631; ER 45 (emphasis added).

Under the Act, the WUTC is limited to resolving disputed issues in its role as arbitrator. 47 U.S.C. §§ 252(b)(4)(B) and (C), § 252(c); *TCG Milwaukee*, 980 F. Supp. at 999. Since the above-quoted language was not disputed, the WUTC did not impose or "levy" a rebundling obligation on USWC. MFS and USWC resolved this issue on their own and included this negotiated item in the interconnection agreement they subsequently submitted to the WUTC for approval. This Court should not permit USWC to go back on its bargain.

Realizing that basing its combination claim on the combination provision would undermine the Act's preference for voluntarily negotiation, and acknowledging that this language was not submitted to the Arbitrator for consideration, USWC now argues

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that the Arbitrator rejected the following disputed language, which USWC characterizes as "an important limitation" on its

duty to combine network elements for MFS: "USWC will not combine USWC's Unbundled loops with USWC's Unbundled Switching Element to provide a finished service to MFS." R 1843; ER 30.

During the arbitration, USWC consistently argued that the disputed language was necessary to prevent MFS from offering a finished telecommunications service based upon a combination of network elements. R 2764; ER 60. USWC conceded in briefing before the Court below that this argument has been foreclosed by *Iowa Utils. Bd.*, 120 F.3d at 814-15; CR 85 at 28 (USWC Opposition at 28).

USWC now argues that the disputed language provided a "critical limitation" on the negotiated combination provision.[15] USWC Brief at 18. Simply put, this issue is a red herring, meant to distract the Court from USWC's voluntary agreement to a negotiated provision that it now wishes it had not negotiated. If USWC was unwilling

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[15] USWC also argues that the Agreement does not "explicitly" provide for a recombination fee. USWC Brief at 18. However, as USWC itself admits, in a footnote, the Agreement does provide for a recombination fee to be assessed by USWC. *Id.* at 18 n.4. Although no dollar amount is specified for this fee, the Network Interconnection and Unbundled Element Request process provides a method by which MFS may request, and USWC may propose a fee for, specific combinations of network elements. R 2622-23; ER 42-43.

APPENDIX C

98-35146

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

U S WEST COMMUNICATIONS, INC.,

Plaintiff/Appellant,

v.

MFS INTELENET, INC., et al.,

Defendants/Appellees.

On Appeal From United States District Court
for the Western District of Washington
No. C97-222WD

REPLY BRIEF OF APPELLANT

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* * * *

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> BellSouth first argues that this issue cannot be reached in this court because MCI did not object to this provision of the NCUC's order when it was proposed. MCI disputes this contention, arguing that [the Act] itself allows parties aggrieved by any section of the Agreement to appeal to [federal district] court. 47 U.S.C. § 252(e)(6). The court agrees, and will address this issue on the merits. To hold otherwise would be to rely on an exhaustion of state remedies argument which does not seem to apply here, where Congress has devised an entirely new scheme.

MCI Telecomm. Corp. v. BellSouth Telecomm., Inc., 1998 U.S. Dist. LEXIS 8303 at *13 (E.D.N.C. May 22, 1998).[5]

In addition, this Court should hear this issue on appeal because it presents a question of legal interpretation of the Act, which the Court would in any case review *de novo*, and any relevant facts are clearly set forth in the record. *See Atchison, Topeka & Santa Fe Rwy. Co. v. Brown & Bryant, Inc.*, 132 F.3d 1295, 1299 n.2 (9th Cir. 1997); *Columbia Steel Casting Co., Inc. v. Portland General Elec. Co.*, 111 F.3d 1427, 1442-43 (9th Cir. 1997); *United States v. Thornburg*, 82 F.3d 886, 890 (9th Cir. 1996).

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[5] MCI and MFS (now WorldCom Technologies, Inc.) have signed a merger agreement. *See* MFS Br. at Corporate Disclosure Statement. Thus, MCI/MFS (WorldCom) is now arguing a position to this Court that is directly contrary to the argument it made, and won, in the Eastern District North Carolina.

MFS and the WUTC also claim that US West cannot challenge the combination provision because US West agreed to it. While US West was willing at the time of the arbitration to combine some elements for MFS, if paid for this service, this was premised on MFS not thereby obtaining finished services at cost-based rates rather than resale prices. See Joint Position Statement at 73, MFS

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ER 30. The arbitrator rejected U S WEST's proposed limitation, and MFS struck the limiting clause from the Agreement based on the arbitration order. *See* Agreement at 71 (XXXI.A.3), USWC ER 55. Thus, U S WEST did not "agree" to the current contract provisions on unbundling and combination of elements.

* * * *

Supreme Court, U.S.
FILED
JUN 8 2000
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(5)

No. 99-1641

IN THE

Supreme Court of the United States

U S WEST COMMUNICATIONS, INC.,
Petitioner,

v.

MFS INTELENET, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF OF PETITIONER

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RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioner advises the Court that the Rule 29.6 statement filed with its petition for a writ of certiorari is still complete and accurate.

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IN THE

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NO. 99-1641

U S WEST COMMUNICATIONS, INC.,

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v.

MFS INTELENET, INC., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF OF PETITIONER

INTRODUCTION

In its petition for certiorari, U S WEST Communications, Inc. ("U S WEST") demonstrated that the Ninth Circuit acted unlawfully by usurping the Eighth Circuit's exclusive jurisdiction under the Hobbs Act to determine the validity of certain Federal Communications Commission ("FCC") rules. In the case under review, the Ninth Circuit upheld a state regulator's arbitral decision imposing obligations on U S WEST based on FCC rules that the Eighth Circuit had vacated on direct review, simply because the Ninth Circuit believed that its sister court's vacation of those rules was erroneous. U S WEST demonstrated that certiorari is warranted both to vindicate the Eighth Circuit's jurisdiction

and to reestablish the principle that state commissions are bound to follow the federal courts' authoritative pronouncements on the FCC rules implementing the Telecommunications Act.

Rather than focus their attacks on the merits, respondents Washington Utilities & Transportation Commission ("WUTC") and MFS Intelenet, Inc. ("MFS")[1] largely attempt misdirection. First, they contend that the regulatory provision in question — which requires U S WEST to combine any network elements that MFS desires in whatever configurations MFS wants — was voluntarily agreed to by U S WEST, and thus cannot be challenged on federal court review. But U S WEST demonstrated to the satisfaction of both the district court and the Ninth Circuit that the particular combination duty that resulted from the WUTC's arbitration went well beyond anything to which U S WEST had voluntarily agreed in the preceding negotiations, and both courts properly analyzed this obligation as an arbitrated decision rather than a negotiated one. Both courts below rejected the respondents' suggestion that they were powerless to review the arbitral decision in question, and this Court should do the same.

MFS also incorrectly suggests that the issues presented by this case are the result of an "idiosyncratic" procedural circumstances that will never arise again. *See* MFS Opp. at 14-15. To the contrary, they already have, and they will do so repeatedly unless this Court intervenes. Under the Telecommunications Act's "surpassing strange" dual jurisdictional scheme,[2] state regulators are constantly implementing FCC rules, and the question whether states are bound to follow the authoritative determination with respect to those rules by a Hobbs Act court will arise again and again. Indeed, the WUTC states outright in its opposition

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[1] MCI WORLDCOM Communications, Inc. is the successor-in-interest to MFS.

[2] *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378 n.6 (1999).

that it believes it is under no obligation at all to follow FCC rules or federal court decisions on those rules when arbitrating future disputes — a veritable announcement that the agency intends to precipitate the very kinds of conflicts about which the Court should be concerned. *See* WUTC Opp. at 23-24.

On the merits, respondents make the strange suggestion that when the Eighth Circuit vacated as contrary to the Act the only legal authority on which the WUTC's decision was grounded, the court's ruling had no binding substantive effect; rather, it simply created a legal vacuum that freed the WUTC to impose (and the Ninth Circuit to ratify) the self-same obligations that the Eighth Circuit had held unlawful. But the Hobbs Act does not bar only collateral attempts to *invalidate* rules — it also bars attempts to *reinstate* those rules. A determination on direct review that an FCC rule is substantively ***un***lawful under the Telecommunications Act is just as binding as a determination that a rule is lawful. The Hobbs Act court's determination is not merely an interpretation of the statute that other courts are free to ignore; it binds both the state regulators who are obligated to follow FCC rules, *see* 47 U.S.C. § 252(c)(1), and the federal district courts that review the states' actions to ensure that they "hew" to federal law.[3] This is the heart of the error below: The Ninth Circuit allowed the state regulators to impose a requirement on U S WEST in the name of federal law that the FCC itself could not have lawfully ordered because the Hobbs Act court held it to violate the Telecommunications Act.

ARGUMENT

1. Respondents' contention that U S WEST voluntarily agreed to the challenged reconfiguration requirement is nothing but smoke and mirrors — a factual contention that

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[3] *Iowa Utils. Bd.*, 525 U.S. at 378 n.6.

has already been twice rejected by the courts below and that has no place here. U S WEST demonstrated below that a separate disputed provision of the interconnection agreement that the WUTC arbitrator had rejected was a necessary limitation on the obligations that U S WEST and MFS had voluntarily negotiated. *See* MFS Opp. at 10a; Reply App. at 1a-2a, 7a. U S WEST had agreed to combine unbundled elements for MFS contingent upon (and only contingent upon) the exclusion of certain network elements — loops and switches — from that obligation. By removing that exclusion during the arbitration and permitting MFS to demand combinations that *included* these elements, the WUTC imposed a combination duty going well beyond the one to which U S WEST agreed, and U S WEST appropriately challenged the resulting obligation in court. *See, e.g.*, MFS App. at 7a, 10a. Although both respondents tried to avoid judicial review of the resulting element combination duty by claiming that U S WEST had voluntarily agreed to it, both courts below properly analyzed the challenged provision as a state-imposed requirement, applying the legal standard for review of an arbitrated requirement, *see* 47 U.S.C. § 252(e)(2)(B), rather than that for a voluntarily negotiated provision, *id.* § 252(e)(2)(A). *See also* Pet. App. at 12a-13a, 28a. Respondents strain mightily to find "allusions" in the courts' opinions suggesting that either court accepted their view,[4] but there are

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[4] For example, the WUTC asserts: "The district court *alluded* to the fact that the combination provision was negotiated when it held that the Eighth Circuit was concerned with 'compelled recombination.'" WUTC Opp. at 21 n.18 (emphasis added); *see also id.* at 10. But the district court distinguished the Eighth Circuit's reasoning on other grounds (related to cost arbitrage concerns) and used "compelled recombination" merely to refer to the FCC reconfiguration rule at issue here. *See* Pet. App. 28a-29a. MFS's reading of the Ninth Circuit's opinion is similarly imaginative: "*Presumably* because it concluded that the provision met even [the standard of review applicable to arbitrated provisions], the court did not discuss whether or not the combinations provision was negotiated." MFS Opp. at 12 n.11 (emphasis added). These allusions

none: both courts below accepted that they were reviewing an arbitrated provision. This twice-failed factual argument merits no further consideration.[5]

2. U S WEST's argument in this case does not depend on "highly idiosyncratic" or "unique" procedural circumstances. *Cf.* MFS Opp. at 14. MFS suggests that the issues presented in this case arise only because the Eighth Circuit happens to be conducting further proceedings after remand from this Court, and it is rare that the Hobbs Act court will be exercising continuing authority over a case when a later appeals court rules. *See* MFS Opp. at 14-15. But the Ninth Circuit's violation of the Hobbs Act stands

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and presumptions are entirely respondents' inventions. The courts below did not discuss respondents' contentions that U S WEST voluntarily agreed to the obligation at issue because they were meritless.

[5] The WUTC also argues that certiorari is not warranted because U S WEST "may renegotiate its agreement with MFS at any time and therefore avoid any recombination duty in the future." WUTC Opp. at 24. But the interconnection agreement is already in effect; the possibility that future events might (or might not) eliminate the challenged requirement cannot affect the appropriateness of review.

Furthermore, the WUTC asserts that it can impose the same combination requirement in arbitration. *See* WUTC Opp. at 23. In fact, it states that it *has* imposed this requirement "as a matter of state law" in other arbitrations. *Id.* Therefore, even if U S WEST attempted to renegotiate the agreement to remove that obligation, interconnecting carriers would have no incentive to agree, knowing that they could force the issue into arbitration and have the WUTC impose the combination duty by regulatory fiat. And the fact that the WUTC continues to impose a combination requirement despite the Eighth Circuit's invalidation of that requirement demonstrates the need for this Court to reaffirm the primacy of federal law and FCC regulations under the Act.

Finally, other interconnecting carriers may attempt to demand that the same combination requirement be included in their agreements under the Act's "most favored nation" provision. *See* 47 U.S.C. § 252(i) ("A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.").

independently of those circumstances, "unique" or not. Even if there had been no appeal to this Court or further proceedings on remand, the Ninth Circuit would still have been wrong to second-guess the Eighth Circuit's original decision to invalidate the FCC reconfiguration rules on direct review.[6] The fact that the Eighth Circuit happens to be in the midst of considering the very question on which the Ninth Circuit usurped its authority only makes the Ninth Circuit's transgression that much more egregious. The basic error, however, is the same.

Far from being anomalies, the sorts of collisions between state regulators and federal courts presented by this case will actually be quite common under the Telecommunications Act's "surpassing strange" jurisdictional scheme. *Iowa Utils. Bd.*, 525 U.S. at 378 n.6. The Act relies on state utilities regulators to implement FCC regulations, subject to federal court review for compliance with the Act and those regulations. *See* Pet. at 3-4. It is virtually certain that state commissions will be implementing FCC rules (and that federal district courts will be reviewing those implementations under 47 U.S.C. § 252(e)(6)) at the very same time that the underlying FCC rules are on direct review in the courts of appeals.

Indeed, it has already happened, and in the very same state. In *MCI Telecomms. Corp. v. U S WEST Communications, Inc.*, 204 F.3d 1262 (9th Cir. 2000), and

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[6] Indeed, under the Hobbs Act, it is *never* appropriate to address an FCC rule's validity in the context of § 252(e)(6) review. The Hobbs Act limits review of a rule's validity to a direct proceeding before a circuit court. 28 U.S.C. §§ 2342(1), 2344. Moreover, as the Fourth Circuit correctly noted, "[t]he FCC is not a party to a § 252(e)(6) action, and surely Congress would not give a court the power to determine the validity of an agency's rules when the agency itself is not a party." *GTE South, Inc. v. Morrison*, 199 F.3d 733, 743 (4th Cir. 1999). *See also City of Peoria v. General Elec. Cablevision Corp.*, 690 F.2d 116, 119 (7th Cir. 1982) (FCC should be defendant in suit to determine validity of FCC rule).

two companion decisions,[7] the Ninth Circuit considered a WUTC arbitral decision ordering U S WEST to place its competitors' equipment on its own premises, based on FCC rules imposing an identical collocation requirement that were simultaneously being challenged on direct review in the D.C. Circuit. *See* 204 F.3d at 1269. Shortly after the Ninth Circuit upheld the WUTC's decision, the D.C. Circuit invalidated the FCC collocation rules on which the WUTC's order was based. *See GTE Serv. Corp. v. FCC*, 205 F.3d 416 (D.C. Cir. 2000). The Ninth Circuit denied rehearing to consider the effect of the Hobbs Act court's determination. *MCI*, 204 F.3d 1262, *reh'g denied* (May 8, 2000). As a result, even though the FCC's collocation standard has been ruled unlawful by the only court with jurisdiction to make that determination, the Ninth Circuit has given the WUTC a pass to impose the exact same regulatory obligations that the D.C. Circuit held unlawful. This situation clearly illustrates that, with states trying to implement FCC rules at the very same time that those rules are under direct review, the chances of a future collision are very high indeed.

Moreover, the WUTC's own arguments suggest not only that similar collisions are likely to arise, but that the WUTC itself has every intention of precipitating them. Remarkably, the WUTC asserts outright that, even if a Hobbs Act court held that the FCC would violate the Act if it imposed certain regulatory obligations on carriers, the *WUTC* could still impose the exact same obligations; in its view, a Hobbs Act court's decision vacating an FCC rule "would simply mean that there is no FCC rule" (WUTC. Opp. at 16), and the WUTC could (it says) simply step in and supply the same requirement that the FCC could not. *See also* WUTC Opp. at

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[7] *See also U S WEST Communications, Inc. v. AT&T Communications of the Pac. Northwest, Inc.*, Nos. 98-35789, 98-35828, 98-35829, 2000 WL 249692 (9th Cir. Mar. 3, 2000), *reh'g denied* (May 8, 2000); *U S WEST Communications, Inc. v. Sprint Communications Co.*, Nos. 98-35821, 98-35823, 2000 WL 249696 (9th Cir. Mar. 3, 2000), *reh'g denied* (May 8, 2000).

23-24.[8] Given that the WUTC is effectively claiming the power to revive FCC rules in substance after their invalidation by a Hobbs Act court, the possibility that these issues will arise again is substantial.

3. Respondents erroneously contend that the Eighth Circuit's invalidation of the FCC's reconfiguration rules merely left an *absence* of regulation that the Ninth Circuit was free to fill however it chose, based on its rereading, *ab initio*, of the Act. *See, e.g.*, WUTC Opp. at 18 ("Because of the continued invalidity of the FCC's combination rule, *there currently is no binding FCC rule* that would require or prohibit [reconfiguration] . . . .") (emphasis added).[9] In respondents' view, the court below was free to interpret the Telecommunications Act for itself, unbound by the Eighth Circuit's determination that a reconfiguration requirement was inconsistent with the Act. *See* WUTC Opp. at 16-20; MFS Opp. at 14-18.

But the determination of a rule's validity on Hobbs Act review is not a one-way street — a court's determination that a rule is ***in***valid because it is unlawful under the governing

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[8] Of course, despite the WUTC's contention that it *could* have imposed the reconfiguration requirement as a matter of state law (an assumption that U S WEST would dispute), WUTC Opp. at 23, the WUTC in fact did *not* invoke any state law in imposing that requirement in this case; the arbitrator cited no authority for the network element obligations other than the FCC rules. Pet. App. at 55a-57a; *see also* Pet. at 14. Therefore, the WUTC's suggestion that the provision may be affirmed based on state law is a red herring.

[9] *See also id.* at 13 ("The invalidation of Rules 315(c)-(f) *simply left no rule in place* requiring incumbent carriers to combine elements.") (emphasis added); *id.* at 16 ("[A] decision by the Eighth Circuit [affirming the invalidation] would simply mean that there is no FCC rule that would require [reconfiguration] . . . it would not mean that the combination provision . . . violates the Act."); MFS Opp. at 17 ("As a result of [the Eighth Circuit] decision, *no relevant FCC rules are in place*. Unless and until the Eighth Circuit reinstates the suspended rules, courts have returned to the world that existed *before* the FCC promulgated the challenged provisions.") (first emphasis added).

statute is no less binding than a determination that the rule is valid. Rather than return the legal landscape to square one, the invalidation of an FCC rule as contrary to the Telecommunications Act must preclude other courts from effectively reinstating that same requirement. Otherwise, the Hobbs Act would confer a circuit court's exclusive jurisdiction only to affirm agency orders, but not to *reject* them; other courts would have free rein to second-guess the reviewing court's analysis and to revive invalidated rules.

The WUTC contends that the court below did not violate the Hobbs Act because it did not "invalidate or vacate" FCC rules, two things that the Hobbs Act prevents. WUTC Opp. at 13-14. But by its plain text, the Hobbs Act also precluded the Ninth Circuit from "determin[ing] the validity of" FCC rules. 28 U.S.C. § 2342 (granting "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), *or to determine the validity of*" final FCC orders to a single court on direct review) (emphasis added). And that is what the Ninth Circuit did; it declared outright that "the Supreme Court opinion [in *Iowa Utilities Board*] undermined the Eighth Circuit's rationale for invalidating this regulation." Pet. App. at 13a. Even if the Ninth Circuit did not formally reinstate the reconfiguration rules, the "practical effect" of its holding — upholding an identical reconfiguration requirement that was imposed by a state regulator acting on no authority *other than* those rules — is no different than if the court had actually reinstated the rules. *See Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 738 F.2d 901, 906 (8th Cir. 1984) (where "practical effect . . . involves a determination of [a rule's] validity," Hobbs Act applies), *vacated on unrelated grounds*, 476 U.S. 1167 (1986); *accord FCC v. ITT World Communications, Inc.*, 466 U.S. 463, 468 (1984) (Hobbs Act applied because issue was same "[i]n substance" as validity determination).

The primacy of the Hobbs Act court's determination of a rule's ***in***validity is particularly vital in the context of the

Telecommunications Act. State regulators are charged with implementing federal law and policy, but are not simply "allowed to do their own thing"; this Court has recognized that they "must hew" to the lines drawn by the FCC and federal courts. *Iowa Utils. Bd.*, 525 U.S. at 378 n.6. *See also* Pet. at 3-4, 16-17. Since state regulators (and reviewing courts) are bound to conform to FCC rules deemed valid on direct review, *see* 47 U.S.C. § 252(c)(1), they must also be bound by a determination that those rules are substantively unlawful. The Court should grant certiorari to make this symmetry crystal clear.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

THE HONORABLE WILLIAM L. DWYER
NO. C97-222WD

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

U S WEST COMMUNICATIONS, INC.

Plaintiff,

v.

MFS INTELENET, INC., et al.

Defendant.

U S WEST'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

* * * *

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As set forth in U S WEST's briefing, the Agreement should include a provision clarifying that U S WEST is not required to combine unbundled elements for MFS. See USWC Opp. at 26-29. See also USWC Br. at 30-33. This contract provision is necessary to clarify U S WEST's obligations in the Agreement because the Agreement contains broad language that "USWC agrees to perform and MFS agrees to pay for the functions necessary to combine requested elements in any technically feasible manner either with other elements from USWC's network, or with elements possessed by MFS." Agreement at 71. The contract provision that U S WEST proposed, and that the arbitrator disallowed, that "USWC will not combine USWC's Unbundled Loops with USWC's Unbundled Switching

Element *to provide a finished service* to MFS,"[19] is necessary to clarify that U S WEST is *not* obligated to provide rebundling of unbundled elements into a finished service.

* * * *

[19] Arbitrator's Report at 12-13 (emphasis added); Agreement at 71 n.9.

APPENDIX B

98-35146

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

U S WEST COMMUNICATIONS, INC.,
a Colorado corporation,
Plaintiff/Appellant,

v.

MFS INTELENET, INC., a Delaware corporation;
ANN LEVINSON, Chairperson, RICHARD HEMSTAD,
Commissioner, and WILLIAM R. GILLIS,
Commissioner, in their official capacities as
commissioners of the Washington Utilities and
Transportation Commission; and

WASHINGTON UTILITIES AND TRANSPORTATION
COMMISSION,
Defendants/Appellees.

ON APPEAL FROM UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF
WASHINGTON
NO. C97-222WD

BRIEF OF APPELLANT

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* * * *

[Page 16]

C. The District Court Erred in Approving a Contract Provision Requiring U S WEST to Combine Unbundled Elements for MFS

A CLEC may either purchase (1) access to pieces of an incumbent LEC's services, so-called unbundled network elements ("UNEs"), or, in the alternative (2) finished retail services, such as basic residential or business service for resale to its own customers. The Act mandates fundamentally different pricing structures for these two types of access. Prices for UNEs must be cost-based. 47 U.S.C. §§ 251(c)(2), 252(d)(1). By contrast, resold services are priced "on the basis of retail rates charged to subscribers for the telecommunications service requested" minus costs avoided by selling the services on a wholesale basis. Id. § 252(d)(3).

For years prior to the Act's enactment, the Washington Commission has priced many finished services well above cost to subsidize residential service, which is priced below cost. For example, flat-rate business lines sell for $26.60 per month,

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while residence lines using roughly the same facilities sell for $12.50 per month. See WUTC v. U S West Communications, Inc., Docket Nos. UT-950200, UT-970766, Commission Decision and Order Regarding Tariff Revisions, slip op. at Table p. 3 (WUTC Feb. 2, 1998), App. 18.

At the time of the arbitration, the FCC had interpreted the Act to permit CLECs to purchase finished services at cost-based rates by ordering UNEs separately, and then requiring the incumbent LEC to rebundle the UNEs for the CLEC into a finished service. See 47 C.F.R. § 51.315(c)-(f). This allowed significant arbitrage on the high margin services.

After this arbitration, the Eighth Circuit rejected the FCC's interpretation and held that the Act prohibits CLECs from obtaining finished services at cost-based rates. Thus, CLECs may not require incumbent LECs to provide UNEs at cost-based rates and then require incumbent LECs to combine those UNEs into a finished service. Instead, the *requesting carrier* must combine thee unbundled elements into a finished service. See Iowa Utils. Bd., 120 F.3d at 813.

The Eighth Circuit reaffirmed and strengthened this holding in its Order on Petitions for Rehearing:

> [Section] 251(c)(3) *does not permit* a new entrant to purchase the incumbent LEC's assembled platform(s) of combined network elements (*or any lesser existing combination of two or more elements*) in order to offer competitive telecommunications services. To permit such as acquisition of already combined elements at cost-based rates for unbundled access would obliterate the careful distinctions Congress has drawn in subsections 251(c)(3) and (4) between access to unbundled network elements on the one hand and

the purchase at wholesale rates of an incumbent's telecommunications retail services for resale on the other.

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Iowa Utils. Bd. v. FCC, 1997 U.S. App. LEXIS 28652, at *3-4 (8th Cir. Oct. 14, 1997) (emphasis added).

The Agreement violates this clear mandate that CLECs (1) must combine the unbundled elements they purchase themselves, and (2) are not permitted to purchase combined elements at cost-based rates. The Arbitrator rejected U S WEST's proposed contract provision that "USWC will not combine USWC's Unbundled Loops with USWC's Unbundled Switching Element to provide a finished service to MFS." Arbitrator's Rep. at 12-14, Agreement at 71 n.9, ER 36-38, 55. Thus, the Agreement fails to provide a critical limitation on the related contract provisions that require U S WEST to "combine requested elements in any technically feasible manner either with other elements from USWC's network, or with elements possessed by MFS" and require U S WEST to "combine elements ordinarily combined in its network in the manner they are typically combined." Agreement at 71 (XXXI.A.3), ER 55. The Agreement therefore plainly violates the Act and contravenes the Eighth Circuit's decision.

Rather than declare that the combination provisions of the Agreement violate the Act, the district court held that in the present case, "any unfair cost arbitrage is precluded by use of a recombination fee equal to the difference between the cost and the wholesale rate for finished service." Order at 7, ER 465. However, it is unclear how the district court arrived at this conclusion, as the Agreement does not explicitly provide for any such "recombination fee."[4] Indeed, no party argued for this resolution during the arbitration or the proceedings in district court.

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[4] The Agreement does provide that "USWC agrees to perform and MFS agrees to pay for the functions necessary to combine requested elements in any technically feasible manner either with other elements from USWC's network, or

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The Eighth Circuit's decisions flatly bar forced recombination of elements by incumbent LECs, not just forced recombinations at cost-based rates. Given that the Act does not require recombination, no "recombination fee" can save recombination provisions imposed in an arbitration under the Act.

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with elements possessed by MFS." Agreement 71 (XXXI.A.3), ER 55. The specific amount of any such fee is not set forth in the Agreement, nor did the court set any fee. In any case, the Eighth Circuit has declared that the Act does not require a LEC to rebundle, and the district court cannot impose such a requirement by imposing its own prices for such a service. Moreover, compensation cannot alter the meaning of the Act or otherwise justify a requirement that is contrary to the Act. See Iowa Utils. Bd., 120 F.2d at 813 (finding that an incumbent cannot be forced to provide superior quality interconnection or UNEs even though it is compensated).